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Reply Brief For Plaintiff In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 186

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,**

Plaintiff in Error,

vs.

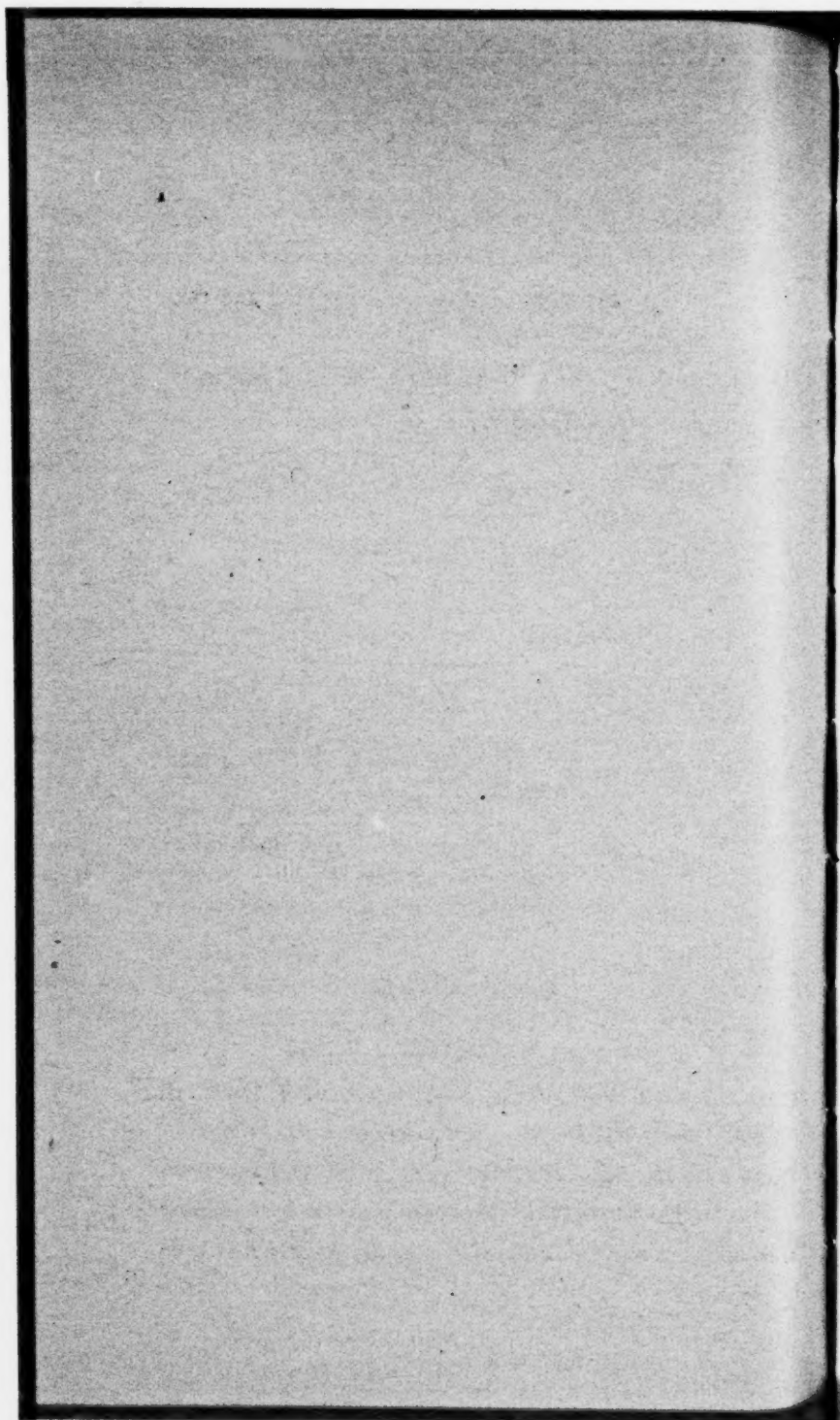
**CITY OF HARTFORD AND STATE OF WISCONSIN,
*Defendants in Error.***

**IN ERROR TO THE SUPREME COURT OF THE
STATE OF WISCONSIN.**

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REPLY BRIEF OF PLAINTIFF IN ERROR.

While at first glance the brief of the defendants in error may seem plausible, it does not bear careful analysis. In order to demonstrate this, we feel constrained to submit this brief in reply. We will avoid so far as we may going into detail.

I.

STATEMENT OF FACTS PROPOSED BY DEFENDANTS IN ERROR
NOT ACCEPTABLE.

Counsel for the defendants in error, addressing themselves to the statement that the undisputed evidence shows the existence of competitive moneyed capital, say that counsel for the plaintiff in error draw "such erroneous conclusion [conclusions?] from the undisputed evidence, that we feel compelled to make our own statement of facts." They

then proceed to what they term a topical grouping of facts. *They do not challenge any statement of fact which we made.* They simply attempt to rearrange and restate under separate headings. In so doing, they omit at some points and by taking parts of the evidence out of their proper setting, leave erroneous impressions at other points. Their statement of facts may not properly be adopted in the decision, whatever that decision may be.

1. *Bank Facts.* (Brief of Defendant in Error, pp. 2, 3.) The discussion of the evidence as to the Bank's dealings in mortgages is incomplete. Not only does the Bank buy and sell and loan on mortgages (R. 26); and negotiate mortgages which are turned over to clients (R. 45); but it deals in bonds of organizations like the Wisconsin Farm Loan Association (R. 26); is interested in federal farm loans and has made such a loan (R. 45); was in the business of selling Wisconsin farm mortgage loan bonds, of which it sold in the neighborhood of \$30,000 or \$40,000 in 1921, these bonds having been bought for its own investment in the first instance and some having been sold, although that was not the prime purpose of their purchase (R. 56); and its real estate loans, as shown by its reports offered in evidence by the city, ran to \$33,325 in February, April and June, 1921 (for detail see our main brief, pp. 18 and 19).

No true picture of the Bank's mortgage loan business may be had if we disregard the dealing in bonds of such organizations. These are financial corporations. Their business is such that their stock constitutes moneyed capital. Their bonds going out into the hands of the public are nothing more nor less than real estate mortgage indebtedness such as was held to be in competition in *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135. In this connection, we direct attention to the powers of land mortgage associations discussed at pp. 48, 62 and 63 of our main brief. These associations carry on operations similar in character to the receiving of deposits, present competition in that field also.

2. "*Lenders*" in *Real Estate Mortgages* and "*Dealers*" in *Mortgages* (Defendant in Error's Brief, pp. 3 and 4). This is the characterization accorded by counsel to certain of the individuals and firms concerning whom evidence was offered.

The inference is drawn that Russell was not lending his own money but merely acted as a lending agency or bought and sold western mortgages (Defendant in Error's Brief, p. 3). Liver testified that Russell was one of a number of individuals engaged in selling notes and mortgages and securities and had been in that line of work eight or ten years (R. 26, 27). Russell said he had been in the loan business ten years. While he said that the individuals for whom he loaned money resided in and about Hartford, he did not as counsel state (Defendant in Error's Brief, p. 3) say that he only loaned for them. On the contrary, he testified that he had loaned out money from time to time to such individuals on interest bearing securities, that is, *bonds and mortgages*, the lands covered by the mortgages being in North Dakota (R. p. 65). His testimony relative to *bonds* was *not limited* to mortgage bonds. The inferences and comments are therefore unwarranted.

It is argued (Defendant in Error's Brief, p. 3) that Sayles was merely a dealer or merchandizer in mortgages. Liver testified that Sayles was engaged in the *loan business* (R. 27). True, in direct examination, Sayles said he had been engaged for ten years in the business of *selling* mortgages (R. 57) but, on cross-examination, he said that he started in business in 1906 and was in the *loaning business* up to 1921 (R. 58). He is quoted as saying that he had sold \$500,000 worth of mortgages in ten years (Defendant in Error's Brief, p. 3). He testified that he had sold about \$500,000 of *outstanding mortgages* (R. 57) and had practically that amount *outstanding in 1921* (R. 58).

Liver is quoted (Defendant in Error's Brief, p. 4) as saying that there were individuals in Hartford "*selling notes*

and mortgages." He in fact testified to individuals "engaged in selling notes and mortgages and securities" (R. 26). He is quoted as saying that these consist of Russell and Sayles (Defendant in Error's Brief, p. 4). He, in fact, gave these names in response to a request to name *some* of the individuals and concerns so engaged and then went on to give the names of Thoma and the Hartford Building and Loan Association as engaged in loaning out money and of Sauerhering & Gehl as making loans in real estate (R. 26). It was brought out on his cross-examination that Sauerhering & Gehl were in the loaning business and that their making loans caused losses to the bank (R. 39). Counsel argued as to what "he evidently means" and as to what "it is inferable" that these individuals and concerns do and how their business is conducted (Defendant in Error's Brief, p. 4). This is not a case in which there was *conflicting* evidence and in which inferences may be indulged in to support a finding based on one of two lines of such conflicting evidence. The evidence is undisputed. It supports the finding made by the *trial court*. That finding may not be wiped aside by inference. Inference may not be indulged *against* a line of undisputed evidence. Inference may *solve*; but may not *create* conflicts.

Liver is quoted (Defendant in Error's Brief, p. 4) as estimating that the loans made by these various parties would run from \$250,000 to \$300,000. He, in fact, testified that it would be about that *annually* and that this was true in 1921 (R. 27) and counsel had him confirm it on cross-examination (R. 39).

Discussing Liver's testimony with reference to the Ziegler Company, counsel *indulge the inference* that it does business in the same manner as other local real estate and mortgage dealers and agents (Defendant in Error's Brief, p. 5). There is nothing in his testimony indicating that the *loan* business of this company was limited to real estate loans. Nor would that warrant the *inferences* asked to be indulged as to their

manner of doing business. *The opportunity for cross-examination and counter evidence was open; but was not availed of.*

Mr. Liver is quoted as saying that many of the local mortgage dealers and agents deposit the moneys they handle with the Bank (Defendant in Error's Brief, p. 39). He, in fact, testified that Sauerhering & Gehl, Russell and Thoma had savings accounts and Sayles and the Building & Loan Association deposited money in the Bank and, also, that the first three received money from their clients and either put it in the Bank or loaned it to someone else and that there were also lots of those concerns, like the Building and Loan Association, that took deposits and held them as deposits. These matters were brought out on cross-examination (R. 39).

Leins, the Register of Deeds, is quoted as testifying that in 1921 there were mortgages running to individuals in the amount of \$1,507,810.54 (Defendant in Error's Brief, p. 5). He testified, not with reference to the amount of mortgages there were, but with reference to the amount that were *recorded in the county in the year*. By way of comment, it is stated that there was no statement as to what percentage ran to individuals and what to corporations (Defendant in Error's Brief, p. 5). The compilation related *only* to mortgages running to individuals.

3. *Dealers in bonds, notes and stocks.* Liver is quoted as testifying that there were Chicago and Milwaukee concerns buying and selling securities, mortgages, notes and bonds and that these were real estate, public utility and municipal bonds (Defendant in Error's Brief, p. 6). In this quotation, there is omitted from his testimony that there were various individuals and concerns in Hartford engaged in selling notes, mortgages *and securities* in 1921 and prior thereto (R. 26 and 27). In testifying as to the bonds sold by outside concerns, he did not limit himself to real estate, public utility and municipal bonds. He said that the securities they offered *included* bonds, notes, mortgages and stocks;

among the bonds, real estate and utility bonds; *in fact*, all *kinds of bonds*—bonds on buildings, bonds on farms and municipal bonds (R. 28).

The testimony of Grove is attempted to be restated (Defendant in Error's Brief, pp. 6 and 7). It is given fully and accurately in our main brief at pages 12 to 15. He is quoted as referring to the business of the First Wisconsin Company as "*so-called bond dealers*" (Defendant in Error's Brief, p. 6). His testimony was that it was engaged in the *so-called bond business* (R. 46). He did not limit the business of his Company to the sale of bonds and securities. He testified as to the extent of the business of his Company in the sale of bonds and securities. (Compare Defendant in Error's Brief, p. 6 with R. 46.) Twice the First Wisconsin National Bank is referred to as the largest bank in Wisconsin (Defendant in Error's Brief, pp. 6 and 7). In point of fact, it is the largest bank in Wisconsin. There is, however, no evidence in the record on that subject. If we were to indulge in the same method of argument, we venture to say that there would be very little left for discussion in this case.

The comment is indulged that the creation of the First Wisconsin Company suggests a doubt as to the power of national banks to engage in the merchandizing of bonds and securities. It suggests rather that the growth of investment and bond houses has been so great and the competition so effective by reason of the restrictions on banks that banks are finding it necessary in Wisconsin to organize affiliated companies, who, by reason of their greater freedom of action, can the better compete with other financial corporations and firms and individuals engaged in that line of business. The First Wisconsin Company's capital stock is \$600,000 preferred, and 10,000 shares of no par value common. Counsel state that the record is silent as to whether this stock is held directly by the Bank or in trust for its stockholders. Grove testified that the preferred stock was held largely by stockholders of the First Wisconsin National Bank and all of the

common stock, excepting directors' qualifying shares, is held for the benefit of the present and future stockholders of the First Wisconsin National Bank (R. 47, 48). The First Wisconsin Company pays an income tax (R. 48), which means, not only that its stock is exempt from ad valorem taxation, but that the dividends thereon are not subject to income tax.

4. *Building and Loan Associations.* The testimony on this subject is fully abstracted in our main brief in the fourth paragraph on page 8, the last paragraph on page 9 and in the testimony of Schauer on pages 15 and 16.

Counsel have not attempted to challenge any statement of fact in these portions of our brief and, in the absence of such challenge, we assume that the restatement will be disregarded.

5. *Acceptance Companies.* The testimony on this subject is that of Mr. Grove. It is found entirely on page 50 of the record.

Counsel do not quote the direct statement that the business of these companies is lending money and discounting commercial paper. Neither do they quote the statement that these companies compete directly with national banks. The statement of the witness that they handle large sums was in answer to the question as to whether they had taken over a large part of the business of national banks.

6. *Foreign Exchange.* (Defendant in Error's Brief, p. 8. Except for the argument, nothing is added to the statement on the same subject in our main brief, page 14.

7. *Personal Investment in Bonds, Securities and Other Investments.* (Defendant in Error's Brief, p. 8). Under this heading, counsel apparently gives no consideration whatever to investments in mortgages, disregarding Liver's statement that certain concerns had loaned out \$250,000 to \$300,000 annually (R. 27); that bond houses sold bonds and securities in the banking district tributary to Hartford in substantially large quantities (R. 22); that the Ziegler Company, not only made loans, but circularized loans (R. 30);

the testimony of Leins as to the recording in a single year of over \$1,500,000 in mortgages (R. 57); the testimony of Sayles that he had outstanding in the vicinity of Hartford \$500,000 of mortgages sold by him (R. 57); and the testimony of Russell that he had been loaning money for individuals in and about Hartford for ten years (R. 65).

There should also be considered Grove's testimony that his Company had sold in a single year, largely to individuals, more than \$25,000,000 worth of bonds and other securities, more than 90 per cent of which were sold in Wisconsin (R. 47); that a large number of individuals in Milwaukee sold their bonds quite largely—extensively throughout the state (R. 47); that there were individuals in Milwaukee engaged in making personal loans, the aggregate of whose loans was a very substantial amount (R. 49).

8. *Loans on Short Term Papers, Similar to Bank Loans.* (Defendant in Error's Brief, p. 8).

9. *Private Banks.* (Defendant in Error's Brief, p. 9).

The discussion under these headings consists wholly of argument.

10. *How "Moneyed Capital" Competes With Banks.* (Defendant in Error's Brief, p. 9). Under this heading, counsel undertake to analyze the testimony of Liver and Grove. For Liver's testimony, they cite R. p. 28. No proper picture of Liver's testimony on this subject can be gathered without considering also his statement that the loaning concerns located in Hartford compete with the business of the bank the same as any other banks would be in competition (R. 27); that the withdrawals affected its loaning department (these withdrawals might be either by firms or individuals engaged in the loaning business or by individuals purchasing bonds or loans and the limitation assumed in counsel's brief (P. 9) is unwarranted.) The direct effect upon the banking business of the sale of bonds in the community is that people draw out their money and buy bonds, thus reducing deposits (R. 28, 29). The Building and Loan As-

sociation competes the same as banks do (R. 29). The conditions as to competition are the same all over the state (R. 30).

Nor is there an adequate presentation of the testimony of Grove. By way of illustration, his ^{company} ~~bank~~ has a direct relation to the First Wisconsin National Bank, taking care of the investment business (R. 48). It conducts some of the business that would ordinarily be conducted by the bank (R. 48). It was organized to take over two of the functions of the bank and was, in fact, in competition with the bank in the selling of bonds (R. 51). Bonding companies come into competition both for capital and for deposits (R. 48). The banks would meet competition from bonding companies and individuals engaged in selling bonds, both in the matter of buying and selling securities and in the lending of money (R. 49). He says that investment houses dealing in all kinds of securities would come into competition with loans "especially in short time loans" (R. 49).

We have thus reviewed the statement of facts which counsel for defendants in error would have the Court substitute for that set out in our main brief, with two thoughts in mind, first, that the correctness of our statement is nowhere challenged, and, second, that the statement sought to be substituted therefor is incomplete and inaccurate. We suggest no purpose to mislead. The inaccuracies have been the result of a somewhat arbitrary attempt to rearrange and classify, in connection with which the true color of the evidence has at various points been lost, due to the fact that many statements have been taken out of their original setting and read in an incorrect light.

II.

COUNSEL'S STATEMENT OF WISCONSIN'S BANKING AND TAXATION LAWS ANSWERED.

At pages 12 to 15 of their brief, counsel for defendants in error discuss the statutes claimed to prohibit all private

banking in Wisconsin. They say that by Chapter 285, Laws of 1909, the Wisconsin banking law was amended by the adoption of *two* new sections, now known as Sections 224.02 and 224.03 of the Wisconsin Statutes of 1923 and 1925. Accuracy requires reference to the sections as they appear in the Wisconsin Statutes of 1921. These two sections there appear as Sections 2024-78l, and 2024-78m, quoted in our main brief at page 69. Chapter 285 of the Laws of 1909 did not merely create two new sections. That chapter is entitled "An Act to create Sections 2024-78l, 2024-78m and 2024-78n of the statutes relating to banking." Since 1907 the Legislature of Wisconsin has followed the practice of making of every act, at the moment of its passage, a revision of the existing statutes so that at the close of every session we have in effect a new set of revised statutes. While by Chapter 285 of the Laws of 1909 *three* new sections were thus created, that chapter standing as a whole introduced *one new subject matter* into the statutes.

Section 2024-78n as it appeared in Chapter 285, Laws of 1909, read as follows:

"Section 2024-78n. Any person, copartnership, association, or corporation doing business in this state as defined in this act, may incorporate as a state bank and may convert into a state bank, on or before September 1st, 1909, as provided in Section 2024-55 of the statutes."

It appeared in the same form in the statutes in 1921, except that for the words "as defined in this act," were substituted the words "as defined in Sections 2024-78l, 2024-78m and 2024-78n," as quoted in full on page 70 of our main brief. A correct understanding of these statutes and their effect can not be had from the limited discussion on page 14 of the brief of the defendants in error. We direct the court's attention, in this connection, to our discussion at pages 70 and 71 of our main brief.

The prohibition against private banking in Section

2024-78m is directed against private banking as defined in Chapter 285, *Laws of 1909*, now preserved in the three sections under discussion.

Before dropping this question, attention is called to the fact that loaning agents are left a wide opportunity by the proviso in Section 2024-78l to the effect "*that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal.*"

At page 15 of their brief, counsel for the defendants in error make this significant statement: "Wisconsin was compelled to abandon its taxation of moneys and intangibles and adopt the income tax system because the taxation thereof had proven a practical failure."

This statement contains a fallacy which is woven like a thread throughout the brief. Reduced to its last analysis, it means either that public sentiment would not permit of the taxation of moneyed capital falling within the description "moneys and intangibles," or that no effective method of reaching it had been devised. Congress did not make the condition thus imposed dependent upon the presence or absence either of a public sentiment permitting such taxation, or of effective means for its enforcement. If the state abandoned ad valorem taxation of other moneyed capital because public sentiment would not sustain it, then in that moment the state lost the right to tax shares of stock in national banks.

If we turn to the other horn of the supposed dilemma, that of the supposed inherent difficulty of finding and assessing intangible property, the answer is immediately at hand. When the state went over to the system of income taxation, it set up entirely new machinery for the purpose of reaching it. That machinery has been so worked out that every taxpayer is compelled to, and does report his

gross income in detail and the sources of that income. The law is being effectively administered. If the state had set up as effective machinery for the administration of the old law there can be no doubt whatever but that every last item of intangible property would have been disclosed by the owners and placed upon the assessment rolls. If, then, public sentiment would not have supported the administration of an ad valorem tax law, the state would thereby lose its right to tax national bank stock.

The same considerations which led Wisconsin and certain other states to go over to the income tax system as applied to moneys and intangibles, led Congress to the amendment of Section 5219 by the Act of March 4, 1923. Wisconsin, instead of meeting the new situation directly by adapting its income tax laws to the form of taxation permitted by the Act of March 4, 1923, has attempted to preserve ad valorem taxation as to national bank stock with the alternative that, if its statutes providing therefor "shall be finally adjudicated or determined" to be invalid in application to national banks, then each bank shall be assessed under the provisions of the income tax law in force during the period from the date of the passage of the law in 1923 until such adjudication or determination may be had.

If public sentiment will not sustain it, then no ad valorem tax may be laid on shares of national bank stock.

On the other hand, the fact that the state today, by the machinery developed in connection with the income tax law, has compelled the disclosure by every taxpayer in detail of the sources of his income, demonstrates that nothing stands in the way except the will of the people, now expressed by the Legislature, not to tax other moneyed capital.

III.

ERRONEOUS VIEWS AS TO "WHAT IS 'MONEYED CAPITAL'".

Under this heading, at pages 18 to 25 of their brief, counsel argue for a restriction of the words "moneyed capi-

tal" which would leave the condition exacted under the permissive statute applicable only to private banks and to corporate bank stock. Reduced to its last analysis, their argument is that such moneyed capital must be used in a *business*; that such *business* must be of a character *normally common* to the banking business; and that to be normally common to such business it must be carried on under restrictions of the same character as those imposed on national banks. In other words, the moment a competitor is left a wider freedom of action—is given a greater handicap in the race—he ceases to be a competitor.

At page 19, counsel say that in *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, and *Bank of Commerce vs. Seattle*, 166 U. S. 463, it was held that *purely personal* investments of individuals in interest-bearing securities did not constitute moneyed capital. We do not find this language in either decision. After using the term several times, counsel "quote" it at page 25, to the effect that moneyed capital does not include "*purely personal*" investments.

They have fallen into error typical of concentration overmuch on mere words. He who would pick out a guiding rule from a line of decisions should concentrate upon the substance of judicial action rather than upon the detail of the language used in laying the basis therefor.

By way of illustration, the first step toward the statement that moneyed capital to be within the statute must be "invested and employed in some *operation* (business) forming a *substantial* part of the *business* of banking" (Defendant in Error's Brief, p. 25, top), is a quotation from the *Mercantile Bank case*, 121 U. S. 138, italicizing the words "employed," "operations" and "capital" (Defendant in Error's Brief, p. 20). The two sentences there quoted are found in 121 U. S. 156 and immediately follow a sentence containing a definition of banking which will not support them and which, later on in their brief, counsel argue the court now to reject in part (Defendant in Error's Brief, pp. 30, 31).

Again counsel say that "the alleged competitive business must be such as is 'normally common' to the banking business" (Defendant in Error's Brief, p. 24, bottom). To lay the basis for this counsel set out quotations from *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135, and *Merchants National Bank vs. Richmond*, 256 U. S. 635. In both, the term is used as descriptive of individual *investments* (not individual businesses) coming within the calls of the statute.

Again, after discussing the manner in which a bank deals with its capital in its business, counsel say that "moneys invested by individuals in bonds, mortgages and interest bearing securities must be 'employed in a similar way' by investment in either permanent (long term) or temporary (short term) securities with a 'VIEW to sale or repayment or reinvestment'" (Defendant in Error's Brief, p. 25). Here counsel interpolate their own interpretation of "permanent" and "temporary" investments. They realize that the rule as thus formulated by them does not require that the individual be engaged in any business. To meet this, they say: "To this should be added for the purpose of making money by the *operation*." For that they quote (Defendant in Error's Brief, p. 24, top) from a decision, not of this Court, but of the Circuit Court of Appeals for the Fourth Circuit in which the word operation is used as descriptive of the act of investing and not as descriptive of a business.

Our ultimate quest is the intent of Congress. We have Congressional interpretation both before and after the *Richmond* case. In 1916, Congress provided for organization of joint stock land banks. Their broad powers are discussed at length in *Smith vs. Kansas City Title Co.*, 255 U. S. 180, at pp. 203 et seq. It is significant that the suit arose on the bill of a shareholder in a trust company to enjoin the directors from *investing* its funds in *bonds* of Federal Land Banks and Joint Stock Land Banks. In the exercise of these broad powers, Congress, while permitting state taxa-

tion of their shares, chose to protect them against competition. It did so simply by making applicable to them section 5219, indicating the view that properly construed the words other moneyed capital as there employed would include any that might come into competition with them. They must have had in mind primarily the money invested in farm mortgages by individuals and in shares of stock in companies engaged in the business of loaning and selling loans on such security. (See our main brief, pp. 57 and 58.)

In 1923 Congress provided for the formation of national agricultural credit corporations with the power to issue trust notes or debentures with a maturity not exceeding three years and to pledge as security therefor any notes, drafts, bills of exchange or other securities held by them; and permitted the taxation of their shares or of the dividends derived therefrom or of their income in such manner as "is or may be authorized by law" in the case of national banking associations; and, also, provided that their debentures or other obligations might be taxed by the states, but that such taxation should not be at a higher rate than that applicable "to other moneyed capital in the hands of individual citizens thereof." Congress here classed these debentures and other obligations as "moneyed capital." Congress clearly understood that "other moneyed capital" included all bonds, notes or other evidences of indebtedness or other obligations of any kind that might come into competition therewith. (See our main brief, pp. 58 and 59.)

When Congress amended Section 5219 by the Act of March 4, 1923, it merely "put into express words that which, according to repeated decisions of this court was implied before," as said in *First National Bank of Guthrie Center vs. Anderson*, 269 U. S. 341; 46 Sup. Ct. 135, and the Congressional record discloses that this was likewise the understanding of Congress.

Congress *did not understand nor intend* that the inquiry would stop when it was ascertained that any given bonds,

notes or evidences of indebtedness were in the hands of individual citizens *not* employed or engaged in the banking or investment business. Neither did it understand or intend that the inquiry would stop when it was ascertained that they were merely personal investments. In that case there remained the further inquiry as to whether these investments were made in competition with such business. *What were excluded were those merely personal investments which were not made in competition with such business.*

Congress also gave, as we submit, an indication of its understanding as to corporations the stocks in which were to be deemed moneyed capital. It must be conceded that Congress understood and intended that the requirement that ad valorem taxation of corporate stocks coming under the description of other moneyed capital in sub-division (b) of Section 1 of the Act of March 4, 1923, would apply to the same corporations, a comparison with which is exacted of states choosing to tax corporate income under sub-division (c) of the same section. Those corporations are there described as "*other financial corporations.*" (For text of Act see our main brief, pp. 77 to 79.)

IV.

ARGUMENT ON COMPETITION REVIEWED.

At pp. 25 to 43, counsel argue that the business of (a) dealers in bonds, mortgages and securities, (b) acceptance companies and (c) building and loan companies are not "normally" common to banks and are, therefore, not competitive.

A. *Dealers in Bonds, Mortgages and Securities.*

They discuss first dealers in bonds, mortgages and securities. Their introduction (pp. 25 and 26) carries the same errors pointed out in our discussion of their statement of facts, pp. 1 to 9, *supra*. The evidence already discussed shows that there were individuals, firms and cor-

porations located both in and about Hartford and in Milwaukee and elsewhere in the state buying, selling, dealing in, and negotiating bonds, mortgages, securities, and industrial, governmental, municipal and real estate mortgage bonds and doing a loaning business. Their activities demonstrate the existence of a large body of individual investors in Wisconsin. When section 5219 was first enacted, Wisconsin was a borrowing state. Farms were being mortgaged and municipalities bonded to finance railroad building. Today, Wisconsin is sending capital east, as Grove says (R. 50), and west, as Sayles and Russell say (R. 58, 65). It is financing its own industries, meeting the borrowing needs of its farming communities and supplying capital to meet the same needs elsewhere.

Hence the large number of financial corporations now operating in the state.

For the purposes of their first argument under this heading, counsel assume that these individuals and firms, corporate or partnership, are merely in the business of trafficking or dealing in mortgages and securities; and argue that they are not in competition because a national bank is not authorized by law to carry on that business. Under the statute which they quote, national banks are given "all such *incidental* powers as shall be necessary to carry on the business of banking; by discounting and negotiating *promissory notes*, drafts, bills of exchange, and *other evidences of debt*" (Defendant in Error's Brief, p. 26). We submit that the power to discount and negotiate includes the power to buy and sell, and that a broader term descriptive of credits generally than "other evidences of debt" could not be found. We beg leave to direct attention to our discussion of this subject at pp. 55 and 56 of our main brief. We do not understand that this court has ever held that national banks have not the powers assumed for them by the comptroller there pointed out at p. 56. The only direct pronouncement on the subject which we have been able to find here is the

one holding that they may deal in "negotiable securities" issued not only by government and municipal corporations but "other corporations" (*Mercantile National Bank vs. New York*, 121 U. S. 138, 156), which counsel now ask the court to limit (Defendant in Error's Brief, pp. 30 and 31).

Discussing the statement of the Comptroller of the Currency that a great number of national banks now buy and sell investment securities and that his office has raised no objection because this has become a recognized service which a bank must render, counsel argue that the Comptroller has simply become a party to ultra vires transactions on the part of national banks. We submit that he is clearly right.

But assume for the purpose of argument that he is not. His statement indicates how effective this form of competition has become. The banks have been forced for their own protection to do the thing which counsel argue is ultra vires. Other financial corporations, by reason of the greater latitude allowed to them, are in many fields competing more effectively with national banks than are state banks with the restrictions which surround the latter.

Counsel argue that the typical dealer in bonds, mortgages and securities is a mere merchant (Defendant in Error's Brief, p. 33) and that dealers in bonds, mortgages and securities do not operate in any wise like private or incorporated banks.

Attention is respectfully directed to the discussion of real estate loans on page 11 of the report of the Comptroller of the Currency for 1924, in which he argues for greater freedom to the banks in the making of real estate mortgages. He says:

(P. 11.) "The argument which is most generally advanced against having long-term real estate securities in national banks is that they are not readily convertible. * * * There is a well-established and definite market for real estate mortgages. This market does not

cover mortgages of as short a term as one year, and, as a rule, the shortest term is five years. If the banks were able to carry these maturities of five years or over, they would then have the notes and mortgages in such condition that they could be disposed of to a wide clientele. A five-year mortgage is salable and convertible, whereas a one-year mortgage is not. On this account alone it is very possible that, instead of increasing the volume of frozen assets of banks, this longer period would produce greater liquidity and at the same time enable the banks to add very much to their services to their customers."

The mortgages they can not take gives them the hardest competition.

Attention is also directed to the charts on pages 13 to 15, giving the percentage of national bank resources to combined resources of national banks, state banks and trust companies from 1878 to 1924 (page 13), the growth in the number of banks (page 14) and the bank resources of national banks compared with state banks and trust companies (page 15). These charts show in a graphic manner the extent to which national banks are losing ground.

Attention is also directed to the discussion of legislation recommended at pages 1 to 4 of the Report of the Comptroller of the Currency for the year 1925. He says:

(Page 2.) "It is a misnomer to call this bill a branch banking bill. The measure proposes to amend the national banking laws in some 18 particulars, only 4 of which relate in any way to branch banking. The other provisions of the bill, such as the authority to lend one-half of the savings deposits upon the security of first mortgages upon improved real estate, the authority to hold their charter powers for an indeterminate period subject to the will of Congress, *the regulation of the investment security business*, and other pro-

visions of this measure will enable the national banks to carry on a modern banking business along the lines already approved by many State laws. * * * Their enactment [*i.e., of the proposed amendments*] into law would enable all national banks to meet more readily the competition from State banks and trust companies which have for a number of years had the authority to do what it is now proposed to confer upon the national banks." (*Italics ours.*)

That congress now entertains the same views as does the comptroller in respect to the power of national banks to invest and deal in "investment securities" is apparent from the text of the amendment of the national banking act now pending and the committee reports in connection therewith quoted in appendix B to this brief.

B. Acceptance Companies.

At pages 35 and 36 counsel discuss acceptance companies. They complain of the brevity of the evidence. It was not attacked either on cross-examination or by counter-evidence. Its substance is given in our main brief at page 14. At page 7, *supra*, we pointed out the errors in the treatment of the subject in the opposing brief. The key to the error in the argument of counsel is the misapplication of the term "normally common to the business of banking" as the test by which to determine whether the stock of a given corporation constitutes moneyed capital. Any "financial corporation," to paraphrase from the Act of March 4, 1923, or any investment company or investment banker or acceptance company, to use the designation now so familiar in the advertising pages of popular magazines, or any loaning company, comes clearly within the statute.

C. Building and Loan Associations.

At pages 37 to 43, counsel discuss building and loan associations. Their argument on this subject is based in the

main on a quotation from an opinion by the present Chief Justice of this court, handed down while judge of the circuit court in 1899, in the case of *Mercantile National Bank of Cleveland vs. Hubbard*, 98 Fed. 465.

Since 1899 the building and loan association has developed far beyond its original purpose. The building and loan association today affords not merely an opportunity for the borrowing of money by small property owners and home builders, but a means of investment for the owners of substantial amounts of moneyed capital.

We set up in Appendix A of this brief the material portions of the Wisconsin Statutes as they stood in 1921, dealing with loan and building associations. These associations are given the power to make loans to members (Section 2011). They may be organized with a capital stock of \$5,000,000, which may be increased an additional \$5,000,000. The capital stock is made payable in periodical installments called dues, not exceeding \$2 per share. When, however, the demand for loans exceeds the income of the association applicable for loans, then it may issue paid-up stock to an amount sufficient to meet such demand. When it shall have accumulated funds in excess of its requirement for loans, then such paid-up stock is retired in such manner as the by-laws provide or the board of directors may determine (Section 2011). Shares withdrawn, forfeited, retired or surrendered become the property of the association and in lieu thereof new shares may be issued (Section 2013). A member need not be a borrower (Section 2014). A member may withdraw his unpledged shares at any time by giving thirty days' notice, in which event he is entitled to receive the dues paid in by him and such proportion of the profits as the by-laws may prescribe within certain limitations (Section 2014-1). The Commissioner of Banking may, during time of war or whenever a national emergency exists, authorize an association to invest not to exceed five (5) per cent of its assets in bonds or other securities of the Federal Government (Section 2014-5a). A borrower may repay his

loan at any time by giving thirty days' written notice of his intention (Section 2014-6). Administrators, executors, guardians or trustees authorized to invest trust funds may acquire and hold paid-up stock (Section 2014-8b).

Since the decision of the Supreme Court of Wisconsin has been based in part on judicial notice, we feel justified in calling attention to the fact that according to the report of the Commissioner of Banking of Wisconsin on building and loan associations and credit unions for the year 1923 the total assets of building and loan associations are given for the year 1921 as \$56,792,364.84. He reports the ratio of increase of total assets for the years 1916 to 1923 to be 18%, 17.8%, 17.4%, 35%, 38.2%, 30.1%, 26.04% and 22.7%, respectively. According to the same report, he gives the total assets in 1923 as \$92,992,108.87. This means an increase during the two years of \$36,199,744.03.

At page 12 of the same report, the total number of associations in 1921 is given as 106. The total amount of dues paid on *installment stock* is given as \$26,121,986.67, and the total amount of *paid-up stock* held by the members is given as \$19,600,243.93.

In the same connection, we call attention to the report of the Comptroller of the Currency for the year 1921, at pages 3 and 4 after calling attention to the laws of California exempting savings deposits, he says:

"The result is that these State institutions, just before tax-listing periods, advertise that savings deposited with them are exempt from taxation, but subject to taxation if held in national banks. The result is that savings accounts are drawn from national banks and transferred to State institutions in great volume. Such seasonal and violent shiftings constitute an embarrassment to the banks, which must keep an abnormally large reserve in cash in order to meet the demands, thus making this excessive cash reserve unavailable for general business purposes. I fear that the exemption in favor

of building and loan companies will be an incentive to similar operations, to the disadvantage of banks and of the business community dependent upon them. Such seasonal withdrawals of savings accounts from the banks, particularly at such a critical time, must inevitably curtail greatly the ability of banks to serve the commercial interests dependent upon them."

At page 174 he calls attention to an unprecedented increase in the membership and assets of building and loan associations in the United States during the year 1920. He says: "There are in the United States 8,633 building and loan associations with assets aggregating \$2,519,914,971, which is an increase of \$393,294,581, or 18.49 per cent gain for the year."

In the table of statistics on page 175 he gives the number of associations in Wisconsin as 97, the total assets as \$43,-641,142 and the increase in assets as \$12,079,058.

The cases cited in this branch of the brief of the defendants in error at pages 37 to 43 are all based either on the quotation above referred to or discussions relating to the right of a state to exempt savings banks from taxation. As stated at the outset of our discussion under this heading, the building and loan association is a very different thing today from what it was in 1899. There is no true analogy between the modern building and loan association and the savings banks referred to in *Mercantile National Bank vs. New York*, 121 U. S. 138. Again, it is to be borne in mind that the savings bank exemption is justified as a matter of public policy. The building and loan association in Wisconsin is not accorded an exemption on this theory. A stockholder in the building and loan association is required to include his dividends in his income for taxation just as he is required to include his dividends derived from any other corporation which does not pay corporate income tax.

At page 43, counsel argue that there is no sufficient proof of competition by dealers in foreign exchange. It is immaterial whether the testimony on the subject covers four-

teen lines or fourteen pages. It is to the effect that there are individuals engaged in selling foreign exchange, that this is one of the functions of national banks and that this business comes into direct competition with national banks. It was not attacked either by cross-examination or by counter-evidence and the Supreme Court of Wisconsin can not, as suggested at page 43 of counsel's brief, dispose of this by considering that this testimony relates only to express companies.

V.

THE COMPETING INDIVIDUAL INVESTOR NEED NOT BE CONDUCTING A BUSINESS.

At pages 44 to 48, counsel argue that there are no individuals in Wisconsin who are "investing" in securities as a "business"; and that all investments are "personal." They proceed upon a technical definition of capital and argue that in order that any money invested by any individual at interest may be deemed moneyed capital, the individual must be maintaining a business. Their idea seems to be that an individual's investments never come within the competitive class until he becomes a banker receiving deposits and loaning, not only his own money, but the money of others.

There is today throughout the country and in all well settled communities such as we have in Wisconsin a large and increasing number of men who are in the investment field. Many of these, while continuing their ordinary occupations, are placing their funds at work in the investment field. There are many in every well established community who have dropped out of all other activities and are giving all of their time and attention to looking after their investments. These we commonly refer to as capitalists. All of these are using moneyed capital in competition with the business of national banks, and magazines and newspapers carry page after page of advertising matter addressed to them and to banks by so-called investment houses or investment bankers.

When they invest, they do so with a view to reinvestment in the event of sale or repayment. They are clearly in competition. When they enter the investment field they affect the loan field.

Mr. Homer B. Vanderblue, Professor of Business Economics at Harvard University, in his "Problems in Business Economics" (A. W. Shaw Company, 1924), says (p. 75) that the demand for long—and short—time use may be regarded as competing in the money market for the use of funds, and he illustrates this by charts. Summing up on this subject, he says::

(Page 76.) "Although the cyclical fluctuations in bond yields are thus very much less than those in commercial paper rates, they are, nevertheless, well marked and directly related to changes in other interest rates and general business conditions. When the business cycle enters the prosperity phase, the demand for funds for industrial enterprise becomes increasingly heavy. Commercial paper rates tend to rise. Investments in bonds are disposed of in the open market by banks, industrial concerns, and others to secure funds for business purposes, and as a result bond prices fall—that is, bond yields rise. During the liquidation and depression periods of the business cycle, on the other hand, the inactivity of trade decreases the demand for commercial loans, and funds are released for the purchase of bonds. Commercial paper rates fall, bond prices rise and yields fall. At such a time, commercial paper rates fall below bond yields, and it thus becomes more profitable to buy bonds than to loan money for short term transactions. Cheap money, in turn, tends to stimulate business and leads to a repetition of these movements of business and interest rates."

The argument at pages 49 to 56, in effect, leads to the conclusion that no one can be in competition with the loaning business of a bank unless they are able to do substan-

tially the same thing that banks do in receiving deposits. If that were logical, then there could be no competition with national banks except that received from banks of deposit.

An erroneous assumption of fact is made in the argument at pages 52 and 53 relative to the plaintiff bank's loans on real estate mortgages. An examination of the bank statements which were offered in evidence by the city will show that the loans tabulated at the top of page 53 were ordinary mortgage loans. The report covering April 28, 1921 (R. 143 and 143a), lists under the head of "Loans and discounts" (R. 143a) two items (g) and (f), aggregating \$33,325, which are tabulated in schedules 6 and 7. Counsel then argue that these must be assumed to include real estate mortgages purchased from the Wisconsin Securities Company, citing R. 56. The record does not bear them out. Liver at this point, was testifying as to farm mortgage bonds.

At pages 64 to 67, counsel argue that the Wisconsin Statute is not void on its face and that to avoid the tax proof must be made of the existence of other moneyed capital in substantial amounts. It was the purpose of Congress in providing for the organization of national banks to encourage their establishment and the investment of moneyed capital therein. It was with this purpose in mind that Congress imposed the condition of the taxation of other moneyed capital, in granting permission to tax the shares of stock. The moment a state passes a law exempting all moneyed capital from taxation, except that invested in incorporated banks, it thereby defeats the primary purpose which Congress had in mind. Where Congress would encourage the establishment of national banks, the state discourages their establishment. The purpose of Congress is just as effectively, if not more effectively, defeated in a state, if we can imagine one, in which there is not as yet any substantial amount of other moneyed capital, as in the state in which it may be found in great quantity. The basic ground of the

attack on the tax is the violation of the Federal Constitution by the taxing law.

Congress provided that the state might tax national bank stock if it taxed other moneyed capital at a rate equally as high. Wisconsin attempted to tax the stock but exempted other moneyed capital. Since the state thus in the express language of the law refuses to comply with the condition imposed, it violates Section 5219 in and by the law itself. Congress must have intended to select for the comparison an element the existence of which might fairly be presumed in every state of the Union. Otherwise, its non-existence in any state would permit that state to tax national banks out of existence.

Investors attempt to forecast the future. They cannot and will not ignore the existence of unfriendly and discriminating legislation. The deterring influence on the prospective investor is as effective while other moneyed capital is non-existent as after it actually comes into existence. The state law carrying such discrimination on its face must of necessity operate to discourage the formation of national banks and the free flow of capital thereto, notwithstanding the present non-existence of other moneyed capital.

VI.

ARGUMENT OFFERED TO EXCUSE NON-COMPLIANCE, PROVES NON-COMPLIANCE.

In Part II of their brief, pages 76 to 97, counsel say that historically and economically considered the "Wisconsin system," consisting of the prohibition of all private banking, the taxation of all incomes and the exemption of moneys, credits and intangibles from ad valorem taxation, neither injures nor discriminates against national banks. They say that down to the time of the passage of the income tax law

the state was not taxing other moneyed capital, the statutes providing therefor notwithstanding. They say that this was because it was not practicable to enforce the law. That is another way of saying that public sentiment would not sustain such taxation. They then say that because these intangibles are now reached and, through the medium of the income tax law made to bear a larger portion of the burden of taxation than they had theretofore, and banks are not so unfairly discriminated against as they were before, they should not be heard to complain. If public sentiment would not sustain the administration of the old law, then ad valorem taxation of intangibles would have been frankly abandoned and with it would have gone the right of the state to tax shares of stock in national banks. It is no answer to a charge of discrimination against national banks to say that the discrimination is not as bad as it was before 1911. The entire argument under this heading is one which might properly have been addressed to Congress with a view to obtaining permission, in states using the income tax, to apply that tax in respect to national banks and their stockholders. It was those considerations which culminated in the Act of March 4, 1923. Instead of justifying, it condemns the course followed by the State of Wisconsin at all times after 1911.

Counsel cite the 1914 report of the Wisconsin Tax Commission showing that as the result of the investigation of 473 estates, taxable securities had been assessed at 31½% of their true value (Defendant in Error's Brief, p. 91). At page 58 of the same report, is found a table of state and local assessments by classes of property for the years 1911 to 1914. The last year in which an assessment of moneys and credits was found was 1911 and the state assessment in that year for bank stock was \$49,584,598, while the assessment for moneys and credits was more than three times that, or \$150,930,603. If the ratio of assessment were that indicated in the portion of the report to which attention has just been directed, it would mean that there was in the

state at the time between \$4,500,000,000 and \$5,000,000,000 of moneys and credits.

A table compiled from the report of the Wisconsin Commissioner of Banking for the years 1911 and 1921 is set out on page 94 of the brief of the defendants in error. The approximate percentage of increase in the number of state banks was 52% and in national banks 25%. The increase of capital of state banks was 107% plus, while that in national banks was 41% plus. The increase in surplus of state banks was 173% plus, while that in national banks was 86% plus.

At pages 95 and 96 is found a discussion comparing the tax burden on \$10,000 invested in stock of the plaintiff bank with that on \$10,000 invested at interest. It is said that as the bank dividends for 1921 were 15%, it would mean a return of \$1,500 on \$10,000 invested in stock of the plaintiff bank. According to the facts assumed for the purposes of their discussion, \$10,000 would purchase \$4,000 par value of stock of the plaintiff bank and the return on that would be, not \$1,500, but \$600. We might add, also, that under the laws of Wisconsin a taxpayer having \$10,000 invested at interest at 6% would merely pay an income tax on \$600. This was subject to possible reduction or entire elimination by (1) the offset of his tangible personal property tax, (2) personal exemptions, (3) losses, or, (4) reduction of net income so as to bring the lowest rates into play.

Respectfully submitted,

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APPENDIX A.

WISCONSIN BUILDING AND LOAN ASSOCIATION STATUTES.

POWERS. SECTION 2011. Such local associations shall have power:

(1) To issue stock to members; to assess and collect from members fees, dues, fines, interest, premiums and other charges, and the same shall not be held to be usurious; to permit or force members to withdraw all or part of their stock; *to make loans to members*; all upon such terms and conditions as may be provided in the by-laws.

* * *

(5) To exercise all such powers as are necessary and proper to enable them to carry out the purposes of their organization.

CAPITAL; SERIES. SECTION 2012. The *capital stock* of any such association shall not exceed *five million dollars*, except that when any association shall have issued stock to the amount of ninety per cent of its authorized capital it may amend its articles of incorporation to provide for an *increase of capital not exceeding five million dollars*; the same may be divided into two or more classes. Stock in any class may be made issuable at any time or in successive series, in such amount as may be provided in the by-laws, or in the absence of such provision, as the directors may determine. If issued in successive series no series shall exceed five hundred thousand dollars nor one-tenth of the aggregate capital stock. The capital stock shall be divided into shares of a par value of not less than fifty dollars nor more than two hundred dollars each, payable in periodical installments, called dues, not exceeding two dollars each per share. *When the demand for loans exceeds the income* of the association applicable for loans, then *the association may issue its paid-up*

stock to an amount sufficient to meet such demands for loans. When such association shall accumulate funds in excess of its requirements for loans, then such paid-up stock shall be retired in such manner as the by-laws provide or as the board of directors may determine.

CANCELLATION OF STOCK; INTEREST ON PREPAID DUES. SECTION 2013. Whenever any shares are withdrawn, forfeited, retired or surrendered the certificate or certificates therefor shall be surrendered and cancelled, and such shares shall thereupon become the property of the association, and in lieu of the same new shares may be issued. * * *

FORFEITURE OF SHARES. SECTION 2014. *If a member not a borrower be in arrears for more than six months for dues, his shares, at the option of the directors, may be declared forfeited.* * * *

WITHDRAWAL. SECTION 2014-1. *A member may withdraw his unpledged shares at any time by giving thirty days' written notice of such intention, and shall then be entitled to receive the amount of dues paid in by him, and such proportion of the profits as the by-laws may prescribe, less all fines, charges and losses accrued or contingent to the time of the notice of withdrawal, as the board of directors may determine, with no dividends, interest or profits from the time of such notice. Provided, however, that the amount of dividends, interest or profits paid shall not exceed the earnings apportioned or credited to the shares of stock withdrawn, and further, that at no time shall more than one-half of the funds in the treasury be applicable to the demands of withdrawing members without the consent of the directors.*

WAR EMERGENCY INVESTMENTS. SECTION 2014-5a. The commissioner of banking may, during a time of war or whenever a national emergency exists, in

writing authorize an association to invest its funds, not exceeding five per cent of its assets, in bonds or other securities of the government of the United States of America.

LIBERTY BOND INVESTMENTS VALIDATED. SECTION 2014-5b. All investments heretofore made by any association in United States liberty bonds and war savings stamps are hereby validated.

PAYMENT OF LOANS. SECTION 2014-6. A borrower may repay his loan at any time by giving thirty days' written notice of his intention. He shall be charged with the amount of the original loan and interest premium and fines in arrears, and be given credit for the withdrawal value of his shares pledged as security. The balance shall be received in full satisfaction of said loan, and the shares thus credited be canceled and revert back to the association. All settlements made at periods intervening between stated meetings of the directors shall be made as of the date of such meeting next succeeding such settlement. *A borrower may repay his loan at his option without claiming credit for said shares, whereupon said shares shall be retransferred to him freed from all claim by reason of said loan. • • •*

TRUST FUNDS MAY BE INVESTED IN PAID UP STOCK. SECTION 2014-8b. An administrator, executor, guardian, or trustee, authorized to invest trust funds, may acquire and hold paid up stock as such, in a building and loan association of this state, but shall in no event exceed the limitations prescribed in subsection 2 of section 2100b of the statutes, and shall have the same rights and be subject to the same obligations and limitations as other stockholders except the right to become a director or officer of an association. Stock issued to an administrator, executor, guardian, or trustee shall specifically name the trust represented.

(All italics ours.)

APPENDIX B.

Excerpts from Congressional Record and Committee reports on pending amendment to banking law.

In the so-called "McFadden Bill" (H. R. 2), passed by the House of Representatives on February 4, 1926, providing for certain amendments of the national banking laws, it was proposed to amend Section 5136 by adding a proviso reading as follows:

[Congressional Record for July 8, 1926, Appendix p. 12923] "(b) That Section 5136 of the Revised Statutes of the United States, subsection 'seventh' thereof, be further amended by adding at the end of the first paragraph thereof the following:

"*Provided*, That the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes, and/or debentures, commonly known as investment securities, under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency, and the total amount of such investment securities of any one obligor or marker held by such association shall at no time exceed 25 per cent of the amount of the capital stock of such association actually paid in and unimpaired and 25 per cent of its unimpaired surplus fund, but this limitation as to total amount shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or obligations issued under authority of the Federal farm loan act.

* * * * "

The report of the House Committee on banking and currency, dated January 12, 1926, and of the Senate Committee, dated March 25, 1926, discussed this proviso in the same language as follows:

"Subsection (b) This subsection is divided into two provisos, each of which recognizes and affirms the existence of a type of business which national banks are now conducting under their incidental charter powers. They may be said to liberalize, in that they confirm the conduct of this character of business; on the other hand, they are restrictive in that the business is confined to definite limits by law.

"The first proviso referred to recognizes the right of national banks to continue to engage in the business of buying and selling investment securities, but at the same time it makes a general definition of the term 'investment securities' and gives the comptroller the authority to make a further definition by regulation. This would give the comptroller the authority to exclude by definition the right of a national bank to purchase undesirable or unsafe investment securities. This provision also limits the total amount which a national bank may take of any one issue of such securities to 25 per cent of its capital and surplus. In this connection it may be noted that this is a business regularly carried on by State banks and trust companies and has been engaged in by national banks for a number of years. The national banks hold today in the neighborhood of \$6,000,000,000 of investment securities. The effect of this provision, therefore, is primarily regulative."

The two Houses not having been in agreement on another feature of the bill, it remained in conference until the convening of the next session in December, 1926. (Congressional Record, page 12922.)

First For Defendants In Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 186

Office Supreme Court

FILED

NOV 29 1922

Wm. R. STAMER

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,**

PLAINTIFF IN ERROR,

vs.

**CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 186

**FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,
PLAINTIFF IN ERROR,**

vs.

**CITY OF HARTFORD AND STATE OF WISCONSIN,
DEFENDANTS IN ERROR.**

**IN ERROR TO THE SUPREME COURT OF THE STATE OF
WISCONSIN.**

BRIEF FOR DEFENDANTS IN ERROR.

For brevity we shall refer to the plaintiff in error as "plaintiff" and the defendant in error City of Hartford as "defendant".

Counsel for plaintiff iterate and reiterate with such great persistence that the undisputed evidence shows the existence in Wisconsin of competitive moneyed capital, and draws such erroneous conclusion from the undisputed evidence, that we feel compelled to make our own statement of facts.

STATEMENT OF FACTS.

A *topical* grouping of facts is helpful.

Unless otherwise stated the facts set forth all relate to the year 1921, the year of the tax herein involved.

The testimony on the question of "moneyed capital" and "competition" is given entirely by the witnesses Liver, President of the plaintiff bank, and Grove, Treasurer of First Wisconsin Company, a bond and investment company; Schauer, Secretary and Treasurer of Hartford Building and Loan Association; Sayles and Russell, dealers in real estate mortgages; Leins, Register of Deeds.

1. *Bank Facts.* Capital stock of plaintiff bank, \$50,000.00 (R. 31); Surplus, \$50,000.00 (R. 32); Total Deposits, \$950,000.00; Certificates of Deposit, \$322,000.00; Savings Deposits, \$249,000.00; Open Account Deposits, \$318,000.00 (R. 34);

The bank buys and sells mortgages and loans on mortgages, *but that is not a very large part of its business*, (R. 26); engaged in negotiating mortgages; have turned over mortgages to clients (R. 45); have *not* been in the business of *selling* mortgages, but have taken them and turned them over to clients (R. 45).

In 1920 and 1921 it obtained about \$30,000 or \$40,000 of farm mortgage loans from Wisconsin Securities Company of Milwaukee, which it sold (R. 56).

The bank buys and sells government bonds and securities; buys those bonds for their own investment and to accommodate clients; disposes of a good many to individuals, (R. 26); buys municipal bonds for its own investment; bought \$15,000 or \$20,000 Washington County bonds at one time; had about \$30,000 or \$35,000 in municipal bonds (R. 40); sold municipal bonds mostly to local clients (R. 44). Bank carries these bonds as capital assets. They are *not* figured with un-

divided profits and surplus (R. 45). The bank has some investments in corporate bonds.

The capital stock, surplus and undivided profits of national banks in the State of Wisconsin in 1921 amounted to between \$50,000,000 and \$55,000,000; state banks between \$55,000,000 and \$60,000,000 (R. 49). The amount of money invested in bonds and other investments in the State of Wisconsin exceeded many times the amount invested in national banks in Wisconsin (R. 49).

2. "*Lenders*" on Real Estate Mortgages and "*Dealers*" in Mortgages. In view of the legal questions herein later discussed it is necessary to properly analyze the testimony.

As to "lending" on mortgages and "dealing" in mortgages, the testimony consists of that given by Liver, Sayles, Russell and Grove. Russell runs a so-called insurance and loan business. He loans money for private parties on mortgages and bonds secured by mortgages. The mortgages are given on North Dakota land and average from three to five years in maturity (R. 65). It thus appears that he is not lending his own money, but merely acts as a lending agency or else he buys the Western mortgages and sells them to Wisconsin parties.

Sayles' business is that of *selling mortgages* in Hartford and vicinity (R. 57). Has sold about \$500,000 worth in ten years. Practically all of the mortgages were Western mortgages bearing about 6% interest. He did not negotiate the loans himself, but purchased the mortgages from bank and loan companies such as Peters & Company, Central Mortgage Company and Interstate Securities Company, all of Minnesota. The mortgages average five years maturity (R. 58). It thus appears that Sayles is a mere *dealer* or *merchandise*r in mortgages on western lands which he procures in the West and merely sells in Hartford and vicinity.

Liver's testimony is not so very definite as to how these mortgage people do business, but when coupled up with the

other testimony the nature of the business is apparent. He says that there are individuals in Hartford "*selling notes and mortgages*" (R. 26). These consist of Ed. Russell and Charles Sayles (above referred to). Referring to Sayles he speaks of him as being in the "loan business" (R. 27), but he does not distinguish between *loaning his own money* on mortgages and acting as *agent* for others in lending money, nor in the *buying and selling* of mortgages. He refers to this general class of mortgage men in this language—"they receive money from their clients and put it in the bank or loan it to someone else", and Mr. Sayles does this (R. 39). He says that one Thoma "is engaged in loaning out money in the City of Hartford", but when this is coupled up with the above statement (R. 39), he evidently means that they are loaning money for their clients and acting as agents or purchasing and selling mortgages. He then makes a general statement that there are real estate firms loaning out money to individuals in that community on real estate and names Sauerhering & Gehl (R. 27), but he makes no statement as to the *method* in which they do business, that is, as to whether they are loaning their own money or merely act as agents and loan on a commission or whether they buy and sell mortgages. In view of the testimony as to the way the other real estate men are handling mortgage loans, it is inferable that they do business in the same manner. He estimates that the loans made by the various parties named by him would run from \$250,000 to \$300,000 (R. 27). He is later cross-examined with reference to his statement of about \$250,000 loaned in a year and he says—

"Q. Where were these loans principally made?

A. Western country." (R. 39 and 40.)

While this statement is made immediately after his examination as to building and loan associations, the second question prior to that evidently shows that the questioner is referring to the statement made by the witness (R. 27) as to the amount of loans that were made in a year by these local con-

cerns outside of building and loan associations. He says that there are Chicago and Milwaukee concerns that are engaged in "buying and selling * * * mortgages * * * " in that community (R. 28). This is evidently a merchandising transaction.

He makes a short statement as to the operations of a company known as the Ziegler Company located at West Bend. He says that this company is engaged in the "real estate and loan business" and does a large amount of loan business in Hartford through an agency by circularizing and soliciting their loans, and this business runs up in the thousands of dollars (R. 30). No statement is made as to whether they are using or *lending their own money*, nor as to whether they are acting as a mere *lending agency* or are *buying and selling mortgages*, nor as to the *location of the lands mortgaged* or the maturity or any other facts *which would establish the competitive nature of the business*. In the absence of testimony on these points the inference is permissible that Ziegler & Company are doing business in the same manner as the other local real estate and mortgage dealers and agents.

Most of these local mortgage dealers and agents deposit the moneys they handle with the plaintiff bank or have savings accounts with that bank (R. 39).

Grove's testimony as to real estate mortgages is brief. He merely says that there are many individuals engaged in *selling mortgages* (R. 50).

Leins, the Register of Deeds, testified that in 1921 there were mortgages running to individuals in the total amount of \$1,507,810.54 (R. 57). No statement is made as to the maturity terms of these mortgages, nor as to what amount, if any, thereof was on improved or unimproved lands, nor as to the percentage of the amount loaned to the value of the property, nor as to what percentage ran to individuals and what to corporations. Investment of industrial corporation's

surplus moneys in mortgages is not "moneyed capital in the hands of *individuals*".

People vs. Commissioners, 4 Wallace 244.

National Bank vs. Boston, 125 U. S. 60.

Therefore, it is impossible to ascertain whether any of them are such that a national bank could, or would, take, nor that they are *competitive*. Not only that, but *presumably* the mortgages are all *personal investments*.

3. *Dealers in Bonds, Notes and Stocks*. Liver testified that there were Chicago and Milwaukee concerns "engaged in *buying and selling* securities, mortgages, notes and bonds in that community" (R. 28). They were real estate, public utility and municipal bonds.

Grove testified that his company, the First Wisconsin Company of Milwaukee, was engaged in the underwriting, wholesaling and general distribution of bonds and securities—so-called bond dealers. In 1921 that company did many million dollars worth of business in the *sale* of bonds and securities (R. 46). He names many other individuals and companies engaged in the same business (R. 47). A great proportion of the bond issues were secured on properties outside of the state. Therefore, the money was loaned to *non-residents* (R. 50). Stockholders of Milwaukee corporate bond houses are largely Wisconsin citizens. Some of the companies named are partnerships in which the partners are residents of Milwaukee (R. 51). First Wisconsin Company is affiliated with the First Wisconsin National Bank, the largest bank in Wisconsin. Its officers and directors are the same (R. 51). This bank organized the First Wisconsin Company to take over two of the alleged functions of the bank (R. 48 and 51). The First Wisconsin Company's capital stock is \$600,000 preferred and 10,000 shares of no par value common stock (R. 48). The record is silent as to whether this stock is held either directly by the bank or in trust for

its stockholders. The creation of this subsidiary or affiliated bond company by the largest bank in Wisconsin suggests at least a doubt by this bank as to the power of national banks to engage in the *merchandising of bonds and securities*.

4. *Building and Loan Associations.* There is no testimony as to the operation of building and loan associations excepting that of the Hartford Building & Loan Association. This association loans money (R. 27 and 29). *Loans are permitted only to farmers and home-owners who must be members* (R. 52). Any individual without restriction may purchase a paid-up stock certificate and become a member (R. 52, 53). He may cancel his certificate on thirty days' notice and withdraw what he has invested. If he withdraws his money he is paid the prevailing rate of interest which in 1920 was 5%. While he holds his stock he receives dividends payable on the last days of June and December (R. 53). A member may purchase a certificate of stock on the installment plan. If he purchases on the installment plan and withdraws within a year he is penalized by being allowed no dividends. If he withdraws after the year he will receive 70% of the dividends granted (R. 54). Evidently the stock certificate of any holder who is not a borrower matures at some date, at which time he is compelled to surrender his stock (R. 54). The funds of the association are used for mortgage loans (R. 54). As above set forth (R. 52) loans are only made to members. The outstanding loans of the association at the end of 1921 were \$136,664.86 (R. 54). The amount of the paid-up stock was \$77,502.71 and the installment stock \$43,691.85 (R. 55).

The current funds of the association are deposited with the plaintiff bank at Hartford and placed in a checking account. That bank has done all of the association's business since it was organized (R. 55). Sometimes the checking account runs as high as \$14,000.00 (R. 56).

5. *Acceptance Companies.* The sole testimony as to acceptance companies consists of a brief statement given by Mr. Grove (R. 50). He says that these companies compete with the national banks by lending money and discounting commercial paper. They handle large sums. He does not describe the nature of the business. No evidence is given as to the maturity of the paper; whether it is payable in installments; whether it is secured by conditional sales agreement or chattel mortgages on automobiles and other similar articles; no testimony as to whether the bank handles similar business themselves.

6. *Foreign Exchange.* Grove in fourteen lines of testimony says that there are individuals in Wisconsin engaged in selling foreign exchange. He does not say who they are or make any statement or reference to the quantity of the business excepting that he says the American Express Company is engaged in that business. He says the selling of foreign exchange is one of the functions of national banks and therefore there is direct competition (R. 50).

7. *Personal Investments in Bonds, Securities and Other Investments.* Grove testifies that there are personal investments in Wisconsin in bonds, securities and stocks running into millions of dollars and that a substantial portion of these investments are held by individuals (R. 48, 49). The capital stock, surplus and undivided profits of national banks in Wisconsin in 1921 was between \$50,000,000 and \$55,000,000 and state banks between \$55,000,000 and \$60,000,000 (R. 49). The amount of personal investments in bonds and so forth exceeds the amount invested in national banks many times (R. 49). Neither Grove nor any other witness testifies to any fact which would show that these investments are other than strictly personal investments within the definition of the latest decision of this court.

8. *Loans on Short Term Paper Similar to Bank Loans.* There is not a syllable of testimony in the record that there

are in Wisconsin any individuals making loans on short term paper secured by endorsement or collateral in the manner in which banks make their ordinary loans, or that there is any competition to any extent whatever in this respect.

9. *Private Banks.* There are no private banks in Wisconsin as they are prohibited by law as is hereinafter set forth. The Wisconsin law prohibits any individual or corporation from employing the word "bank" in its name unless it incorporates as a state bank. While it may be debatable (hereinafter discussed) as to whether an individual or private corporation not using the name of "bank" may set up a place of business and carry on the business of *discounting short term paper or making loans similar to ordinary bank loans*, there is no testimony in the case to show that any corporation or individual is engaged in such business to any extent whatever.

10. *How "Moneyed Capital" Competes with Banks.* Liver and Grove evolved a remarkable theory as to competition. In our discussion we use the word "competition" in the sense of doing a business which a bank is authorized to do and normally does in carrying on its banking business. Liver's testimony in substance is as follows:

When the loan men and the Building & Loan Association draw their money from the bank in substantial amounts these withdrawals affect the bank's loaning department. When dealers in bonds, notes, mortgages and stocks sell, and the depositors *withdraw* the money from the bank, such as savings accounts and time deposits, and thus *reduce the bank's fund*, this is competition, although the witness does not know whether this money gets back into the bank again immediately in some other form (R. 28).

Grove's theory and argument is as follows:

There is competition for capital and competition for money which would ordinarily be on deposit with the bank. Banks must sell stock to get money and someone has to fur-

nish the money. If those who would otherwise invest in bank stock use their funds for other investments the bank is deprived of an opportunity to obtain capital and in that sense there is competition (R. 48). He says there is competition for business between banks and bond-holders because banks are authorized to buy and sell securities. (This is an erroneous assumption as will hereinafter appear). As lending money is a bank function investment houses who sell securities come in competition with the bank. Money of individuals awaiting investment is on deposit with the banks and then when these individuals invest in bonds *they withdraw from the bank and this is a competition for funds* (R. 48, 49).

Liver testifies that the building and loan associations compete because they receive deposits and make loans and pay a higher rate of interest than the bank (R. 29). He is in error as to their receiving deposits unless the selling of membership certificates, either paid-up or in installments, constitutes the receiving of deposits. He refers to the local mortgage dealer's business of \$225,000 or \$250,000 a year whose loans are made principally in the western country (R. 27, 39, 40). He does not claim that these real estate mortgage loans have affected the value of the bank ^{and} (R. 40). Obviously, a loan on a Minnesota or Dakota mortgage is one that a local Wisconsin bank could not have made and therefore is not competitive. Witness has noticed the withdrawals by individuals for investment purposes over a period of ten or twelve years and if these withdrawals had not been made the loaning power of the bank would be strengthened (R. 40, 45). He admits that the local real estate mortgage dealers and the building and loan association deposit their moneys in the plaintiff bank, together with the moneys they receive from clients, and thereby the bank benefits therefrom (R. 39). Other than the foregoing there is no testimony as to how the alleged "other moneyed

capital" competes with the normal functions and business of a national bank.

THE DECISION OF THE TRIAL COURT.

This action was a law action brought to recover an illegal tax paid under protest. It was tried by the Circuit Judge of Washington County, Wisconsin without a jury. The court made findings of fact and conclusions of law (R. 17-19). The fifth finding of fact was a general one in the following language:

"That during the year 1921 there was a very large amount of moneyed capital in the hands of individual citizens of said city of Hartford, running into many hundreds of thousands of dollars, that was neither assessed for taxation nor taxed, which entered into competition with the banking business, including the banking business of the plaintiff.

"That during said year, 1921, there were vast amounts of moneyed capital in the hands of individual citizens of this state, running into millions of dollars that entered into competition with the banking business, that under the provisions of said section 70.11 subsection 10, were wholly exempted from taxation."

The pertinent conclusion of law was as follows:

"The tax so in form levied and assessed against said shares of stock was unauthorized, illegal and void in its inception, and in violation of, and repugnant to, the provisions of section 5219 of the Statutes of the United States pertaining thereto; and the taxing officers of the defendant city were without power or authority to assess the said shares for taxation or to levy any tax against the same."

The Supreme Court of Wisconsin held, in accordance with its previous rulings, that the findings were *general* and that such findings are not binding upon the supreme court but the court is permitted to consider the facts in the case as an original question (R. 76). Previous similar rulings on this question were as follows:

Chippewa Bridge Company vs. Durand, 122 Wis. 85;

Weinhagen vs. Hayes, 174 Wis. 233.

BRIEF STATEMENT OF WISCONSIN'S BANKING AND TAXATION LAWS.

A more detailed discussion of these laws, and the fruitless efforts of the state of Wisconsin to tax moneys and intangibles, will be set forth in another part of this brief but a brief statement at this point is advisable to assist the court in the following discussion in relation to some of the questions raised by brief of plaintiff in error.

Since the early history of Wisconsin it has exercised the privilege given it to tax national banks under the enabling authority as now set forth in Section 5219 of the United States Statutes. This statute, after amendment by Chapter 72 of the Laws of 1903, persisted in substantially the same form down to 1921, and is set forth as Appendix C in brief for plaintiff in error at page 79. This section together with sections 70.37, 70.38, 70.39, and 70.40 appear as sections in a general Chapter entitled "Assessment of Taxes".

Up to 1911 the same chapter provided for the taxation ~~tax~~ of personal property and section 1036 defined personal property to include all debts due including "moneys and effects of any nature or description having any real or marketable value".

In 1911 by chapter 658 the Wisconsin legislature adopted its income tax system and amended section 1038, which was

a part of the chapter entitled "Assessment of Taxes" relating to exemptions, and included in the exemptions the following:

"All moneys or debts due or to become due to any person and all stocks and bonds including bonds issued by any county, town, city, village, school district or other political subdivision of this state, not otherwise specially provided for."

In 1911—when the income tax law was adopted and intangibles were exempted—*national banks were not authorized to loan money on real estate mortgages*. The first statute giving national banks such authority was the Federal Reserve Act, adopted in 1913, and as amended in 1916 and 1918, will be found in Federal Statutes Annotated, Supp. 1918, p. 472, being Sec. 24 of the Act.

Up to 1909, while incorporated and private state banks were under strict statutory regulation, there was no prohibition against private or unincorporated banking business. By chapter 285 of the Laws of 1909 the Wisconsin banking law was amended by the adoption of two new sections, now known as sections 224.02 and 224.03 of the Wisconsin Statutes of both 1923 and 1925, which sections read as follows:

224.02:

"The soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business by any person, copartnership, association, or corporation, shall be deemed to be doing a banking business, whether such deposit is made subject to check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent, pending investment in real estate or securities for or on account of his principal."

224.03 :

"It shall be unlawful for any person, copartnership, association, or corporation to do a banking business without having been regularly organized and chartered as a national bank, a state bank, a mutual savings bank, or a trust company bank. Any person or persons violating any of the provisions of this section, either individually, or as an interested party in any copartnership, association, or corporation shall be guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than three hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail not less than sixty days nor more than one year, or by both such fine and imprisonment."

Since prior to 1909 there has been in existence what is now section 221.49 of the Wisconsin Statutes of 1923 which prohibits any person, partnership or corporation not subject to supervision and examination by the Commissioner of Banking to use the word "bank" on an office sign or on letterheads, bill heads, notes, receipts, etc., or in any wise to indicate that his or its business is the business of a bank.

In 1910 the Wisconsin Supreme Court in the case of *MacLaren vs. State*, 141 Wis. 577 held that the first section above quoted prohibited the department stores from accepting moneys on deposit on which interest was payable. The Commissioner of Banking has also ruled that the statute prohibits the organization by an industry of a department for the encouragement of thrift which involves the acceptance of deposits from their employees. See opinion of Supreme Court in this case—R. 75. This distinguishes the Wisconsin situation from the Minnesota situation as appears from the case of *State of Minnesota vs. First National Bank of St. Paul*, Docket 31543, argued herewith. Therein it appears a large amount of moneys are received on deposit by mercantile and industrial concerns from their officers and employees. (See

Record in that case, pp. 126, 130). In the *MacLaren Case* it is held that we have no banks of issue or circulation in Wisconsin because the Wisconsin law does not permit its banks to issue paper money. (See page 580.)

The banking business is specially protected by other statutory and constitutional provisions. Banking laws must be passed by a two-thirds vote of the members of each house (Wis. Const. Art. II, Sec. 4). The danger of excessive competition between banks is safeguarded. No new bank can be organized in any community unless the Banking Commissioner shall determine, among other things, that "public convenience and advantage" will be promoted by permitting the Bank to organize. Wis. Statutes, 1925, Sec. 221.01, sub. L.

Wisconsin was compelled to abandon its taxation of moneys and intangibles and adopt the income tax system because the taxation thereof had proven a practical failure.

See later discussion.

See opinion Wisconsin Supreme Court this case—R. 74.

As to general failure of all efforts to tax moneys and intangibles on an ad valorem basis, see the following:

Bank vs. Mayor, 100 Fed. 24. (C. C. A.)

State vs. First Nat. Bank of St. Paul, 204 N. W. 874.

Since 1911 in addition to the system of bank taxation, the state of Wisconsin has had the following system of taxation:

1. General property tax which includes real and personal property other than moneys, credits and intangibles.
2. Corporation taxes on public utility companies.
3. License taxes on the gross earnings of telephone and insurance companies.
4. Income taxes.
5. Inheritance taxes.

6. Occupation taxes on the operation of coal docks and elevators.

7. By the income tax law of 1911 the income of state and national banks, mutual savings banks, trust companies, mutual loan corporations, building and loan associations and certain cooperative associations were exempt from the payment of an income tax but all other corporations were required to pay the income tax.

See decision of Wisconsin Supreme Court—R. 76.

DECISION OF THE WISCONSIN SUPREME COURT.

The Wisconsin Supreme Court decided in substance as follows :

1. In the enactment of the Wisconsin statute there was no unfriendly discrimination or hostile intent on the part of the State of Wisconsin against national banking associations.

2. The restriction in the federal statute against taxing the shares of national banks at a greater rate than "other moneyed capital in the hands of individual citizens" is applied to moneyed capital in "competition" with national banks, which is any material amount of moneyed capital engaged in a *business* which bids against national banks for *business which they are authorized to do*, "competition" being opposed to monopoly and involving the idea of striving to obtain the same thing.

3. Capital invested in building and loan associations is not in competition with national banks.

4. Brokers and dealers in bonds, mortgages and securities not being bankers as indicated by section 221.49 of the Wisconsin statutes are not in competition with national banks as national banks are not *authorized to traffic* in mortgages, bonds or securities except as *incident* to their principal business.

5. Merchandisers of securities are not bankers and all persons doing a banking business in Wisconsin are required to organize as banks.

6. Acceptance companies purchasing conditional sales contracts are not in competition with national banks, there being a wide gap between the securities handled by such companies and the ordinary commercial paper accepted by banks.

7. Express companies being public utilities and assessable on an ad valorem basis the same as national banks will not be considered in competition with national banks in the absence of a showing that the capital in these companies is assessable on a lower rate.

8. Investments of individuals in bonds, mortgages and securities are not in competition with national banks in any consequential amount, within the business field of banks.

9. "There are no concerns or individuals within the state of Wisconsin engaged in *enterprises* in which the *capital employed* in carrying on its *business* is 'money' where the object of the business is the making of profit by its use as money except banks. All such persons, firms and corporations are required to organize as banks. In this respect the situation in Wisconsin, by reason of its banking laws, is radically different from those in most states, and so far as we are able to discover, not heretofore dealt with."

ARGUMENT.

PART I.

The claim is vigorously made in this case that the capital employed by the individuals and corporations engaged in the various lines of business set forth in the testimony is moneyed capital which comes in competition with the banking business and that, inasmuch as the State has exempted moneys and intangibles from ad valorem taxation, this works an in-

tentional discrimination against banks in violation of Section 5219. It is further claimed that the Wisconsin Supreme Court improperly took judicial notice of facts and matters. It is also claimed that personal investments of individuals in bonds, mortgages and interest bearing securities constitute *per se* competitive moneyed capital and that judicial notice of the quantity and character of such investments may be taken by the court supplementary to such facts in relation thereto as appears in the evidence.

These contentions require a discriminating discussion of the language and meaning of the decisions of this court in so far as it has discussed and decided, in the various cases, what constitutes "moneyed capital".

WHAT IS "MONEYED CAPITAL"?

Prior to the decision of this court in *Mercantile National Bank vs. City of New York*, 121 U. S. 138, the court was not called upon to make any discriminating decision as to just what was and what was not "moneyed capital". Its prior decisions *assumed* that money employed in various ways constituted moneyed capital. For instance, without citing cases, it was assumed that moneys due on judgments, accounts receivable, executory contracts for the sale of real estate and other similar transactions where interest was due, constituted moneyed capital. In the *Mercantile Bank Case* there arose the first occasion for the court to determine whether these words should be given their broadest literary meaning, or whether they should be limited by the context and construed in accordance with the purposes of the law. The nature and extent of that case need not be stated because it is fully quoted in the brief of plaintiff in error and in the briefs of companion cases submitted herewith. This case was followed by various other cases, hereinafter referred to, applying, illustrating and amplifying the rules of that decision.

In the cases of *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, and *National Bank of Commerce vs. Seattle*, 166 U. S. 463, the Mercantile Case was fully quoted and considered and applied. In those cases it was held for the first time that purely personal investments of individuals in interest-bearing securities such as bonds and mortgages did not constitute moneyed capital which were competitive with the business of national banks.

This was followed later by the *Merchants National Bank of Richmond vs. City of Richmond*, 256 U. S. 635, which case arose in a very peculiar way. Certain things in that case caused the national banks of the country to believe that the court had repudiated some of its former rulings or had limited the same and held, and intended to hold by its decision, that purely personal investments constituted competitive moneyed capital. As a result, a flood of litigation was started in the various states where, like Wisconsin, income tax laws had been adopted and moneys and intangibles exempted from ad valorem taxation because of the absolute and complete breakdown of that system of taxation. In other states the litigation arose under laws where the state, instead of giving up in desperation its efforts to enforce an ad valorem tax on moneys and intangibles, imposed a special and very low rate on such items on the theory that thereby it might coax out from under cover the maximum of taxable property of such character and thereby realize in the aggregate a greater quantum of tax than if such items were taxed at the same rate as banks and real property on an ad valorem basis. Typical cases of this character from Kentucky and Minnesota are now before the court to be heard at the time of the hearing of this case.

Since this case and the Kentucky and Minnesota Cases were decided, this court has decided the case of *First National Bank vs. Anderson*, 46 S. Ct. 135, in which it has explained the decision in the Richmond Case and limited and clarified its meaning; denied the contention that this case was

intended to overrule any rules or principles decided in the *Mercantile Bank Case* or the *Chehalis Case*, or any of the prior cases. It was directly decided in the *Anderson Case* that purely personal investments in the hands of individuals did not constitute moneyed capital in competition with national banks. In the present case, and in perhaps the companion cases submitted herewith, it will be necessary to decide, or at least to lay down rules whereby it may be determined when interest-bearing securities such as bonds held by individuals as investments are "purely personal" investments not in competition with the business of banks and when they are investments that are competitive with the business of banks.

In discussing these questions, in order to assist in applying rules laid down in these cases and the facts in these cases, we feel it is helpful to quote some of the literal language of this court.

"The key to the proper interpretation of the Act of Congress is its policy and purpose."

Mercantile National Bank vs. City of New York, 121 U. S. 138.

In the *Mercantile Bank Case* the court, after defining the business of banking as established by law and custom, said:

"These are the operations in which the capital invested in national banks is *employed* and it is the *nature of that employment* which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals *carrying on these operations* do come into competition with the business of national banks, and *capital* in the hands of individuals *thus employed* is what is intended to be described by the Act of Congress."

In *First National Bank vs. Anderson*, 46 Sup. Ct., p. 138, it is said :

"The term 'other moneyed capital' in the restriction is not intended to include all moneyed capital not in-

vested in national bank shares, but only that which is *employed in such a way* as to bring it into substantial competition with the business of national banks."

Citing *Mercantile Bank Case* and *Aberdeen Bank vs. Chehalis*, *supra*.

The *Mercantile Bank Case* decided that the words "moneyed capital" do not mean all capital, the value of which is measured in terms of money, nor does it necessarily include all forms of investment in which the interest of the one is *expressed in money*; therefore, shares of stock in industrial and other companies, though expressed in money value, do not constitute moneyed capital.

"The purpose of the restriction is to render it impossible, in taxing the shares to create and foster an unequal and *unfriendly* competition with national banks by former shareholders in state banks or individuals interested in private banking or engaged in *operations* and investments NORMALLY COMMON to the business of banking."

First Nat. Bank vs. Anderson, *supra*.

"They" (the words 'moneyed capital') "include not only moneys invested in private banking properly so-called, but investments of individuals in securities that represent money at interest and other evidence of indebtedness such as NORMALLY enter into the business of banking."

Merchants National Bank of Richmond vs. City of Richmond, 256 U. S. 635.

"Obviously by this section, as interpreted by the decisions of this court, the limitation applies solely to a parallel with the individual or corporation whose *capital*

in money is used with a view of *compensation for the use of the money.*"

Talbot vs. Silverbow, 139 U. S. 438.

Palmer vs. McMahon, 133 U. S. 660.

Mercantile Bank Case, *supra*.

"It" (moneyed capital) "of course would exclude bonds, notes or other evidences of indebtedness when held *merely as personal investments* by individual citizens not engaged in the banking or investment *business*, for capital represented by this class of investments is not employed in substantial competition with the business of national banks."

First Nat. Bank vs. Anderson, *supra*.

"Its main purpose is to render it impossible for the state in levying such a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a *business similar* to that of national banks or in engaging in *operations and investments* of a like character."

Des Moines Nat. Bank vs. Fairweather, 263 U. S. 102, page 116.

Mercantile Bank Case, *supra*.

In the *Mercantile Bank Case*, a slightly varying expression is used, to-wit:

"The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or *individuals carrying on a similar business and operations and investments of a like character.*"

"The *business* of banking, including all the *operations* which distinguish it, might be *carried* on under state

laws, either by corporations or *private persons*, and *capital* in the form of money might be *invested* and *employed* by individual citizens in many single and separate *operations* forming substantial parts of the *business* of banking."

Mercantile Case, *supra*.

"The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount or otherwise, which are, from *time to time*, according to the *rules of the business*, reduced again to money and *reinvested*. It includes money in the hands of individuals *employed in a similar way*, invested in loans or in securities for the payment of money, either as an investment of a permanent character, or temporarily, *with a view to sale or repayment and reinvestment*. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Mercantile Bank Case, *supra*.

Chehalis Case, *supra*.

"Moneyed capital is brought into such competition where it is invested in shares of said banks or in private banking and also where it is employed, substantially as in the *loan and investment features of banking*, in making investment by way of loan, discount or otherwise, in notes, bonds or securities with a *view to sale or repayment and reinvestment*."

First Nat. Bank vs. Anderson, *supra*.

In *National Bank vs. Mayor of Baltimore*, 100 Fed. 24, on page 29, the Circuit Court of Appeals of the Fourth Circuit, in stating the rule of the *Mercantile Bank Case*, stated in the second paragraph above, interpolates the words "for the pur-

pose of making money by the operation" in the following statement of the rule:

"When such capital is invested in loans or securities of a permanent or temporary character, if it is so invested with a view of sale and reinvestment *for the purpose of making money by the operation*, it is moneyed capital."

The normal and literary meaning of the word "capital" by itself must be considered.

In 9 C. J., pages 1278-1279, in defining "capital" it is said:

"When used with reference to the property of individuals in any particular business the term * * * (capital) means the *property taken from other investments or uses*, and *set apart* for and invested in a *special business*, and in the increase, proceeds or earnings of which property, beyond the expenditures incurred in its use, consist the profits made in the business."

In *Clark vs. Bailey*, 21 Wallace 286, in defining "capital" it is said:

"It then means all property taken from other investments or uses, and *set apart* for, and invested in a *special business* and in the increase, proceeds or earnings of which property, beyond expenditures incurred in its use, consist the profits made in the business."

See also *First National Bank vs. Turner*, 154 Indiana 456; 57 N. E. 110.

Summarized:

1. The purpose of the statute is to prevent "unfriendly and unequal" competition.
2. The alleged competitive business must be such as is "normally common" to the banking business.

3. It must be invested and employed in some *operation* (business) forming a *substantial* part of the *business* of banking.

4. The money must be used as "capital" with a view of "compensation for the use of the money."

5. It does not include "purely personal" investments.

6. Inasmuch as the capital of a bank is *invested* in securities, which are *from time to time* according to the *rules of the business* reduced *again* to money and *reinvested*, in order to be competitive, and not be considered "purely personal", the moneys invested by individuals in bonds, mortgages and interest bearing securities must be "employed in a similar way" by investment in either permanent (long term) or temporary (short term) securities with a "VIEW to sale or repayment or reinvestment". To this should be added "for the purpose of making money by the *operation*".

With these rules in mind and in order to meet the contention of plaintiff in error that the *evidence in this case* shows the existence of substantial amounts of competitive moneyed capital which is exempt from taxation to the prejudicial injury of the bank, it becomes necessary to discuss in detail the particular propositions of law presented by the evidence.

THE BUSINESS OF (A) DEALERS IN BONDS, MORTGAGES AND SECURITIES; (B) ACCEPTANCE COMPANIES; (C) BUILDING AND LOAN ASSOCIATIONS ARE NOT "NORMALLY" COMMON TO BANKS, AND, THEREFORE, NOT COMPETITIVE.

A.

Dealers in Bonds, Mortgages and Securities.

The evidence shows that in the vicinity of Hartford there are various parties, persons and companies who *buy and sell*

mortgages. For the purpose of argument we will assume this is a state-wide condition. The proof also shows that in that vicinity and throughout the state there are bond houses, companies and firms like the First Wisconsin Company, Edgar, Ricker & Company, Morris Fox & Company and others who *buy and sell* industrial, government and municipal bonds and stocks and other securities. Undoubtedly, these dealers and companies employ money in their business. A local dealer in mortgages either uses his own or borrowed capital, buys the notes secured by mortgages (in Hartford mostly on western property) and sells them to his local customers. Bond houses and partnerships presumably use their own or borrowed capital and buy and sell bonds. *The manner of operation of these bond houses is not disclosed in the evidence.* We will assume, for argument, that it may be judicially noted that they join syndicates and buy complete bond issues from underwriting companies and resell their bonds to customers at a profit. Also that they will procure and buy for customers stock, bonds and securities for a commission. We contend that the business of these dealers and merchandisers is not competitive for several reasons:

1. They are not in competition because a national bank is not authorized by law to carry on the *business* of trafficking or *dealing* in mortgages or securities.

The express powers given to banks, so far as material to this action, are set forth in the seventh sub-paragraph of section 5136, volume 6 of the Federal Statutes Annotated, Second Edition, page 654, as follows:

“Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on

personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title."

In *First National Bank vs. National Exchange Bank*, 92 U. S. 122, at page 128, it is said:

"*Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in Fleckner vs. Bank U. S., 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a 'dealing' in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.*"

In *People vs. Goldfogle*, 205 N. Y. S. 870, a case similar to this, it was contended that the New York bond houses were in competition with the business of banks. The court held otherwise and quoted from *Morse on Banks and Banking* (5th Ed., Vol. 1, Section 59), as follows:

"In this country the general rule is that any bank may loan on the security of stocks or bonds of other corporations but *cannot buy and sell them* * * *. It is no part of the banking business to engage in 'traffic' in merchandise or financial securities."

In the *Goldfogle Case* the court further says:

"It is not the business of a national bank, either by statute or in fact, to invest or *deal* in corporate bonds. They *invest* surplus funds in corporate bonds as a *mere incident* to the banking business exactly as they may rent offices in a bank building to others * * *."

The Goldfogle case was affirmed on appeal by the Supreme Court, Appellate Division, First Department, in 211 N. Y. S. page 85. A companion case, *People ex rel Peabody, Houghteling & Company vs. Goldfogle*, was also affirmed by the same court and division in 211 N. Y. S. page 114. In that case it was held that an investment company, buying and selling complete issues of corporate bonds secured by realty mortgages, having powers defined in the general corporation law, stock corporation law and banking law of New York, but not having power to receive deposits or issue its own debenture bonds or notes secured by deeds or deeds of trust, were not in competition with national banks. In that case the court approved the text of Pratt's Digest of National Banking Laws, at page 13 where the author says:

"A national bank has no power to deal in stocks and bonds, or buy and sell them upon commission. Such operations are not incidental to the business of banking as defined in the statute. * * * And the prohibition is implied from the failure to grant the power."

The court also quotes with approval the decision of this court in *California Bank vs. Kennedy*, 167 U. S. page 362 at page 366.

Both of these cases were affirmed without opinion by the Court of Appeals of New York on March 30, 1926, reported in 152 N. E. pages 418 and 419 on the authority of *People ex rel Pratt vs. Goldfogle*, 242 N. Y. 277. The opinion in the

latter case is too long to quote at large but should be examined by this court.

And in section 71 (c) of *Morse on Banks and Banking* supra, it is stated:

"A bank cannot traffic in merchandise, stocks, or securities."

And at section 77:

"It has been held not to be incidental to the banking business, nor an implied power pertaining to a bank, to buy or sell stock or bonds.

"A bank which lends money at interest on the security of bonds is not the rival of a dealer who purchases bonds *merely for the purpose of reselling them to investors.*"

See also Sec. 208 (a) Vol. 2, Part II, p. 662, *Morse on Banks and Banking*, 5th Ed.

In *National Bank vs. Mayor of Baltimore*, 100 Fed. 24 (C. C. A.), a national bank stock tax case, the court said, p. 30:

"It will be observed that the 'dealing in negotiable securities' is not one of the functions of a national bank prescribed by the law of its creation. That is commonly considered the business of a broker, but we are not required in this case to determine whether or not it is *proper* business of a national bank."

The following cases amply sustain the contention here made:

Corn Exchange Bank vs. Kaiser, 160 Wis. 199.

Weckler vs. Bank, 20 Amer. Rep. 95.

Bank vs. Pierson, 31 Amer. Rep. 341.

Fleckner vs. Bank, 8 Wheat. 337, 351.

First Nat'l. Bank vs. Nat'l Exch. Bank, 92 U. S. 122.

Concord Bank vs. Hawkins, 174 U. S. 364.

Talmadge vs. Pell, 7 N. Y. 328.

California Bank vs. Kennedy, 167 U. S. 362; 17 S. C. 831.

McBoyle vs. Nat'l. Bank, 122 Pac. 458.

First Nat'l. Bank vs. Converse, 200 U. S. 425; 26 S. C. 306, 311.

Hotchkiss vs. Bank, 106 N. E. 974.

Lexington vs. Bank, 75 Miss. 1.

National banks cannot deal in securities on commission nor act as agent or broker.

Farmers Bank vs. Smith, 77 Fed. 129.

Grand Forks Bank vs. Anderson, 172 U. S. 573; 19 S. C. 284.

Pollock vs. Lumbermans Bank, 168 Pac. 616.

See Federal Reserve Act, Sec. 19—Title "Insurance Agents."

Nor can they purchase for speculative purposes.

Metropolitan Trust Co. vs. McKinnon, 172 Fed. 846.

Hotchkiss vs. Bank, 106 N. E. 974.

Counsel may rely on a definition of the banking business given by the writer of the opinion in *Mercantile National Bank vs. City of New York*, 121 U. S. 138; 7 S. C. 826, on p. 835, as follows:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and *dealing in negotiable securities issued by the government, state and*

national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute, 'moneyed capital' ”.

The court was there discussing the question as to whether money invested in the stock of railroad companies, mining companies, insurance companies and other business corporations, was employed in competition with banks. There was not there involved any question of “dealing” in mortgages, bonds or other negotiable securities, and it is quite apparent that the definition was quite *casually* given and without any thought to determine accurately the proper functions of a banking business.

This is further apparent in the following language used with reference to trust companies, found on page 837 of 7 Sup. Ct., to-wit :

“They receive money on deposit, it is true and *invest* it in loans, and *so deal*, therefore, *in money, and securities for money*, in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the act of congress.”

While the national banks may deal in government and municipal bonds, that power is conferred upon them because they are governmental agencies and the sale of government bonds is a governmental function and therefore *incidental* merely to the business of banking.

Junction City vs. Central National Bank, 96 Kansas
407; 153 Pac. 228.

The ownership by banks of government bonds is but an *incident* to the banking business.

First National Bank of Council Bluffs vs. Burke
(Iowa) 196 N. W. 287.

On page 56 of brief of counsel for plaintiff in error it is stated that according to the annual report of the Comptroller of Currency for the year 1924 approximately one-third of the investments of national banks consists of railroad, public service, corporation and other bonds and collateral trust and other corporation notes. They then say about the middle of the same page that the Comptroller of the Currency states that "a great number of national banks now *buy and sell* investment securities, and the office of the Comptroller has raised no objection because this has become a recognized service which a bank must render". It appears from Appendix F referred to in counsel's brief and set forth in full on page 84, not only that the banks have an immense amount of money invested in industrial and private corporation bonds but also that they have \$69,892,000 invested in "all other stocks" than in federal reserve banks. If this means that national banks are investing or dealing in corporate stocks, then within the repeated decisions by this court, such transactions are *ultra vires*. If it means that they have merely acquired these stocks through the process of foreclosing collateral or protecting other investments, then the item has no significance.

While we do not consider it now at all material whether a bank may *invest* in industrial bonds, it is material as to whether it may "buy and sell" such bonds as a business. If the Comptroller means that, notwithstanding the law, which the banks have so frequently violated, he has raised no objection because the doing of this business has become a "recognized service which a bank must render," then he certainly has become a party to *ultra vires* transactions on the

part of national banks and no help can be derived from his unfortunate admission in this respect.

Counsel say on the same page that the authority to invest in corporate bonds and notes is derived from section 5136 which gives authority to carry on as a part of the business of banking, among other things, "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." If an industrial bond is equivalent to a note secured by a twenty year trust deed on real estate, and the bank could not loan to the borrower in the first instance on such promise and security, it is obvious on its face that this clause in the statute cannot be the source of authority for what is otherwise an illegal transaction.

On the same page counsel say that the opinion in *Newport National Bank vs. Board of Education*, 114 Ky. 87 is unanswerable on the subject of the express statutory power of national banks to invest their funds in corporate bonds. It is unfortunate counsel does not disclose to the court that the bonds therein were all public school bonds similar to government, state and municipals, and that the court in its argument assigned *special* reasons for the authority to banks which are not applicable to industrial bonds. It uses the language "corporate" bonds but it means *public* corporate bonds. These bonds are not secured by real estate as are industrial bonds.

2. The typical dealer in bonds, mortgages and securities is a mere *merchant*. The object of his business is not the making of profit by the use of *money as money*; it is not used with a view of *compensation for the use of money as money*.

He merchandises and traffics in this subject of trade the same as the man who buys and sells automobiles, clothing or other articles of personal property. His money is employed in his business not for the purpose of getting a return *for the use of money* but for the purpose of making a *profit* in buying and selling the article of merchandise. If

he buys or sells on commission, his compensation is in the nature of a service charge.

As the Wisconsin Supreme Court said in this case (R. 87):

"They are not in Wisconsin permitted to use the words 'bank' or 'savings bank', 'banker' or the plural thereof, upon any office sign or on any letterhead or other written or printed matter". Sec. 221.49, Wis. Statutes.

At the same place the court further says:

"National banks do not use their capital as a 'rotating' fund in the purchase and sale of securities."

3. Dealers in bonds, mortgages and securities do not operate in any wise like private or incorporated banks. They do not receive money on deposit and thereby operate on the capital of others. They operate either on their own or borrowed capital. They are not themselves money lenders in any sense of the word. As a matter of fact, they are proper aids and stimulants to the banking business. It may be assumed that they carry their money deposits in banks; that they are large borrowers from banks, and thus obtain their capital to carry on their business. Banks like the First Wisconsin National Bank, as it appears in this case, organize such investment companies like the First Wisconsin Company, referred to in the testimony, for the very purpose of carrying on business which a bank cannot properly handle, but which has a tendency to bring more business to the bank. How many of these investment companies auxiliary to banks there are in Wisconsin does not appear.

Within the rules elsewhere discussed in this case to the effect that a substantial, direct and competitive effect of the use of other moneyed capital must be clearly proven, it is certain that no such proof has been made in this case on this phase of the subject.

B.

Acceptance Companies.

By referring to the statement of facts page 8 of this brief, it will appear that the testimony in this case as to acceptance companies is woefully brief and meager. There is a mere general statement that their business is that of lending money and discounting commercial paper, and a *conclusion* that they compete directly with banks. It is further stated that they handle large sums. The number of these companies or the extent of their operations is not given. The way in which they conduct their business is not shown. Within the decisions of the courts elsewhere stated in this brief we might content ourselves with saying that this showing is entirely inadequate to establish any use of competitive moneyed capital in this respect. The operations of these companies are so recent that it may not be safe to assume any common knowledge. Subjecting ourselves to the charge of going out of the record, we will state that we are informed that these companies operate somewhat in the following manner:

Dealers in automobiles, motor trucks, motorcycles, vacuum cleaners, electric washing machines, pianos, talking machines and other similiar articles make sales on the installment plan taking notes or so-called "acceptances" under contracts in the nature of conditional sales contracts. Acceptance or securities companies purchase these notes, and sell and otherwise deal in them. For the purpose of obtaining capital for carrying on their business, they borrow heavily from the banks on their own notes, using the notes and contracts that they have acquired as collateral. In fact they occupy a twilight zone between pawnbrokers and the banks. They are not under regulation and many are going busted.

The nature of this kind of business was aptly described and

characterized in *People vs. Goldfogle*, 205 N. Y. S. 870, p. 881, wherein the court said:

"Bankers' Commercial Securities Co. Inc., purchases from dealers, who buy from manufacturers, conditional sale contracts, leases, and chattel mortgages on automatic piano player, calling for weekly or monthly installments over an average period of 30 months; the payments average about \$12.50 a month on each transaction. This is not the acquisition of evidences of indebtedness which 'normally enter into the business of banking'." Citing *Merchants' Nat. Bank vs. Richmond*, 256 U. S. 635, 41 S. C. 619.

Obviously the appearance of these companies in the commercial world is a demonstration that they are merely handling business that the banks cannot take care of. It may be assumed that the dealers in any community are bank depositors and borrowers. They finance themselves at their banks as much as they can. Banks are evidently loathe to become direct purchasers and owners of conditional sales installment contracts evidenced or secured by notes or acceptances. If it were otherwise, the banks would be handling them themselves. There is no claim in this case that the banks are handling this particular type of paper or security, although they are in the general business of discounting straight and ordinary commercial paper. This is either undesirable or overflow business which does not and cannot enter into competition with "normal" banking business.

As the Supreme Court of Wisconsin said in this case (R. 87):

"Their business more nearly corresponds with that of a pawnbroker or a chattel mortgage broker than that of a bank."

C.

Building and Loan Associations.

It must be conceded that the building and loan association in the city of Hartford, the same as other building and loan associations in the state of Wisconsin, is a heavy lender on real estate mortgages to its members. It does not follow, however, that these associations and money lenders are in competition with the banks. The building and loan associations have been classed with savings banks and trust companies, and they are sufficiently alike to receive similar treatment.

An illuminating opinion is that of Mr. Chief Justice Taft of this court, in a decision made by him, when he was circuit judge, in the case of *Mercantile National Bank of Cleveland vs. Hubbard*, 98 Fed. 465. In that case one question was as to whether or not the exemption from taxation of shares in building and loan associations was a discrimination against national banks. Judge Taft first referred to the decision of the Supreme Court in *Mercantile Bank vs. New York*, 121 U. S. 138, wherein it was held that *savings banks* do not come in competition with national banks. Thereupon he says:

"It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, and that the capital invested in them, though subject to a somewhat different rule of taxation, *cannot be regarded as moneyed capital in competition with the moneyed capital in national banks*, any more than is capital invested in savings banks. The chief object of building associations is to encourage the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construc-

tion of the house. *The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law.*"

This case was reversed on appeal (105 Fed. 809) but on an entirely different point.

In *Consolidated National Bank vs. Pima*, 48 Pac. 291, it was held that the failure to tax shares in a building and loan association was immaterial, since the limitations in Sec. 5219 applied solely to individuals, associations or corporations whose business was similar to or parallel with that of a national bank in making profit by the use of moneyed capital as money, and that the building and loan associations did not compete with national banks. The court reviews all of the decisions of the United States Supreme Court, and then says:

"Said building and loan association cannot be compared with the banking association. The exemption or rather the failure, to tax shares of the building and loan association does not make the tax in question illegal. *Mercantile Bank vs. New York*, 121 U. S. 138; 7 S. C. 826."

In *First National Bank vs. Dawson*, 213 Pac. 1097, the principal point involved was the alleged competition of building and loan associations. The state law imposed a tax on national bank shares on the basis of 40% valuation, and on shares in building and loan associations on the basis of 7% valuation, and it was claimed that because these associations were in competition this was a discrimination. The court reviews all of the earlier decisions of the Supreme Court of the United States at length, and quotes fully and approves Mr. Justice Taft's opinion in the Hubbard case in 98 Fed. 465. The court discusses fully the nature and functions of building and loan associations and the relation of

their business to ordinary banking business. We take the liberty of making the following quotation from the opinion in this case, to-wit :

"But it is argued that the Glendive association was in competition with the plaintiff, *because a part of the business of the plaintiff bank is making loans on real estate, and this is likewise the business of the association.* A national bank has but *limited authority* to loan money on real estate. That this is true is shown by an inspection of section 5137, U. S. Rev. Stat. (U. S. Comp. St. Sec. 9674), and 39 Stat. at Large 752; 1918 Supplement to Federal Statutes Annotated, 472 (U. S. Comp. St. Sec. 9763). *National banks are not permitted to make long time loans, and such loans as they make are secured by simple or straight mortgages, so-called, made as a rule to those who are strangers to the corporation.* Building and loan associations are permitted to make longtime loans to their own members, to those who stand in direct relationship to the associations' management; they are stockholders of the association. The chief object of building associations being to encourage the building of homes by poor people, it is a common practice, for one desiring to build, to borrow from an association a certain amount, subscribing for an amount of stock at least equal to the amount he borrows, also securing the loan by giving a mortgage upon the property to be improved. By paying interest upon his mortgage and so much a month upon his stock, the stock eventually becomes of sufficient value to equal the amount of the loan. Thus he pays for his home upon the amortization plan. The mortgage may be sold and transferred as other mortgages are. *Such mortgages often are purchased by banks and others who desire interest-bearing securities.*

"It seems that the plaintiff bank bought mortgages from the association, as the law permits it to do. And

the asociation assumed to buy mortgages from the bank which it did not have any right to do under the statute. A building and loan association is permitted to invest its moneys in the securities named in the statute and none other. So if the association attempted competition with the bank in buying and selling mortgage securities, it did what the law prohibits.

"It is clear, then, that the finding of the district court upon this issue cannot be sustained for two reasons: (1) Under the law the Glendive building and loan association was not and is not permitted to do business in competition with the plaintiff bank within the purview of section 5219; (2) the state of Montana, in levying taxes, may, if it sees fit, favor building and loan associations as a matter of public policy, and its action in so doing will not be deemed unfriendly discrimination against national banks."

In *People vs. Goldfogle*, 205 N. Y. S. 870; 881, affirmed by appellate division, 211 N. Y. S. pp. 85 and 114, it is said:

"The Bankers' Loan & Investment Company is a building and loan associaton. Its object is to 'encourage industry, frugality, home owning, and the saving of money by its members, the accumulating of savings and the loaning thereof to its members' as authorized by the New York Statute. It conducts the conventional business of a building and loan association. It approximates closely to a savings bank, of which Mr. Justice Matthews, in *Mercantile Bank vs. New York*, 121 U. S. 138, 161, 7 Sup. Ct. 826, 838 (30 L. Ed. 895), says:

'No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To

promote their growth and progress is the obvious interest and manifest policy of the state.'

"The national bank certainly needs no protection against the activities of an association intended to aid small investors by thrift to accumulate from their savings sufficient money to build a home. *First Nat. Bank vs. Dawson County*, 66 Mont. 321, 213 Pac. 1097."

In *First National Bank vs. Chehalis*, 166 U. S. 440, 17 S. C. 629, p. 636, second column, the court reviewed the Mercantile National Bank case as to its decision in reference to savings banks, and said:

"As to savings banks, it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the act of congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the state to encourage the accumulation of small savings belonging to the industrious and thrifty, and were within the reasonable exercise of the power of the state to exempt particular kinds of property; and the conclusion of the court in respect to savings banks was thus expressed:

"The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded on just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the share of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they (the banks) are taxed at a rate not greater

than other moneyed capital in the hands of individual citizens otherwise subject to taxation.' ”

The same rule as to savings banks has been adopted by the Eighth Court of Appeals in *National Bank vs. Mayor*, 100 Fed. 24, p. 29.

In *Jenkins vs. Neff*, 186 U. S. 230, 22 S. C. 905, this court held that owing to the difference between the business of New York trust companies and the business of national banks a different method of treatment in taxation was justified because of the very limited competition between trust companies, as properly operated under the New York laws, and national banks. The court said :

“Trust companies are not organized primarily for banking purposes ; they are designed for other purposes, as pointed out in the *Mercantile Bank Case*, and it was never the purpose of the Federal government to interfere with the policy of the state in reference to the formation and development of such corporations as it should judge expedient, even though it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the state. As was said in the *Mercantile Bank Case* in reference to savings banks, ‘however large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.’ ”

As pointed out in some of the cases discussing building and loan associations, they frequently do a great deal of business

with the banks and are feeders of business. It appears in this case that the building and loan association in question places its moneys in a depository voted by the association. The First National Bank of Hartford does all the business of the association, and at one time it had \$14,000.00 on open checking account, not drawing interest (R. 55).

Within the rules of law laid down and the facts in this case, even any theoretical or technical competition between building and loan associations and national banks is so remote, indirect and unsubstantial that the exemption from taxation cannot be deemed a discrimination under or a violation of Sec. 5219.

THERE IS NO SUFFICIENT PROOF OF COMPETITION BY "DEALERS IN FOREIGN EXCHANGE".

As pointed out in the statement of facts in this case, p. 8, there are only fourteen lines of testimony by the witness Grove on this subject. He says he knows that there are individuals engaged in selling foreign exchange and that this business comes in direct competition with the banks. He does not name the individuals or show their method of carrying on their business nor the extent thereof. He then says that the American Express Company is engaged in selling foreign exchange and is thereby a competitor. Under this state of facts it is very clear that no sufficient evidence of any substantial amount of competition is made out so far as this business is done by individuals. The Supreme Court of Wisconsin, page 89, considers that this testimony merely shows testimony by express companies "which are under the laws of the state a public utility and therefore assessable on an ad valorem basis", and it not being made to appear that they are being assessed at a lower rate than the shares of national banks are assessed.

THERE IS NO EVIDENCE OF ANY BUSINESS DONE IN WISCONSIN BY INDIVIDUALS IN THE WAY OF LENDING MONEY ON "SHORT TERM PAPER".

The record in this case is entirely barren of proof of any business of this character done in Wisconsin other than by banks. Business of this character obviously would be the most typical kind of competitive business, and if there was any such business then a substantial amount could and would have been proven. Obviously, individuals cannot afford to carry on this business. Wisconsin banking laws do not permit them to do business under the name of a "bank". They cannot accept deposits, they must do business on their own capital. It is apparent on the face that no individual could open up an office which was in fact a banking office, pay rental, hire employees and assume all the overhead expense and do a profitable business merely on his own money when banks are doing business on deposits of customers amounting generally to a great deal more than the original capital invested in the business.

THERE ARE NO INDIVIDUALS IN WISCONSIN WHO ARE "INVESTING" IN SECURITIES AS A "BUSINESS"; ALL INVESTMENTS ARE "PERSONAL".

At the time this case was tried in the trial court and argued and determined in the Wisconsin Supreme Court, the decision of this court in the Richmond Case had raised a question as to whether "purely personal" investments constituted moneyed capital. The cases of *First National Bank of Aberdeen vs. Chehalis*, 166 U. S. 440, 17 S. C. 629, and *National Bank of Commerce vs. Seattle*, 166 U. S. 463, 17 S. C. 996, had a few years prior thereto clearly held that purely personal investments in interest-bearing loans, discounts and securities were not competitive with national banks. In this situation a very large and important part of the argument in

the Wisconsin court was addressed to this question. We confidently submit that the matter is now disposed of by this court by the case of *First National Bank of Guthrie vs. Anderson*, 46 S. Ct. 135. However, that case and all of the previous cases leave it an open question as to whether or not there might be certain individuals employing their funds as "capital" and making investments in long or short term securities with a view to continued investment and reinvestment. (See definition, page 24, this brief.)

We must confess that from experience or matters of common knowledge, we do not recognize this type of individual. The evidence in this case does not show, nor do we believe that in Wisconsin there exists, any individual or non-banking corporation who has set aside a fund as "capital", within the definition of this court hereinbefore cited, and is maintaining an establishment or a business with overhead expense, which business is carried on for the purpose of investing this individual's funds in long or short term securities with a "view" to sale and reinvestment "with the idea of making a profit on the operation". Assuming that this kind of a business is a *normal* function of the bank particularly with relation to *corporate bonds*, we say, as heretofore twice stated, no individual in Wisconsin can carry on such a *business* as this where the object of the business is "to make money by the use of money as such". He cannot possibly compete with the banks inasmuch as the bank has a vast amount of free money with which to do business. Every individual, whether he is a lawyer or whether he is a high wage earning mechanic like an employee of the Ford Company or the Nash Motor Company, who invests his surplus earnings in corporate bonds or stocks, does so, of course, with the idea of getting a return by way of dividends or interest for the use of his money, but certainly up to a certain stage his investment is a "purely personal" investment. If the bonds mature he receives his principal and accumulated interest, if the preferred stock is called he receives the prin-

capital and the premium, and these funds are again seeking investment, but we submit that this does not constitute him a person doing an "investment business". Also, owing to fluctuations in the securities market or the value of money, the value of his stocks or bonds may increase so much that he cannot afford to hold the same and it is for his best interest to sell and take a profit and then seek reinvestment. Certainly this kind of a transaction does not change him from a purely personal investor. If he sells for a *profit* on the sale of his security, that particular kind of a transaction is not normal to banks. Banks, as heretofore shown, are not entitled to deal in speculative stocks or bonds or to buy and sell "for a profit". We confidently submit that as to a purely personal investor, when his principal is paid in or even when he is obliged to sell and take the profit on his principal, the use of his funds for reinvestment does not constitute him a competitor with banks. What this court plainly had in mind was that the individual handling investments in order to be a competitor must be in a "business"; he must have set aside a "capital"; he must employ his capital as banks do.

The Wisconsin court properly took judicial notice that there were no individuals engaged in the investment "business", which business is competitive with national banks. However, even if an error has been made as to judicial notice, there is not a syllable of evidence in the case to show that the **INVESTMENTS OF INDIVIDUALS IN BONDS OR INTEREST-BEARING SECURITIES ARE OTHER THAN PURELY PERSONAL INVESTMENTS.**

On the other hand, we submit that the investments of national banks in long term corporate bonds are *ultra vires*. In 1917 the Comptroller of the Currency held that national banks could not invest in corporate bonds secured by real estate trust deed, and used the following language:

"These bonds are issued by an individual on the security of this real estate, and *are therefore real estate loans, subject to the provisions of Section 24 of the*

Federal Reserve Act and to the limit prescribed by Section 5200, Revised Statutes. If the owner's valuation of this property is correct, the bonds would come within the fifty per cent requirement, but if the company advertising them for sale is correct, the total issue of bonds exceed 50 per cent of the value of the property, and they would be unlawful investments for a national bank. It is also noted that the bonds are dated January 1, 1917, and that the first maturity date is January 1, 1919, the maturities of portions of the issue running up to 1923. At this time, therefore, none of the bonds would be lawful investments, as they all run for more than one year and are secured by city property. In cases of this kind, this office would advise the bank that the bonds are loans subject to Section 24 of the Federal Reserve Act, and also Section 5200 Revised Statutes, and as none of them conform to Section 24, relative to time for which they may run, they would constitute illegal investments and should not be taken."

See Federal Reserve Bulletin, Volume 3 (1917), p. 456.

For eighteen years Mr. Thomas B. Paton, the well known attorney of New York City, has been general counsel for the American Bankers' Association. In 1922 he published a volume of his opinions on banking questions covering a period of eighteen years. While this work is not a text book, yet it is prepared by an expert and is more like the text books of old times in that the book contains opinions and analyses of the author. In 1920, under paragraph 541, he rendered an opinion to the effect that long term bonds secured by real estate trust deeds were really the same as notes secured by ordinary mortgages of the same period, and that it was very doubtful as to whether a national bank could purchase as an investment such bonds of an industrial corporation.

See Sections 693 to 695 of Vol. 1 - Paton's Digest - Published in 1926

We agree that many banks are investing in corporate bonds, but we contend that they do so at their own risk, and the investments are ultra vires. Their violation of the law cannot change the illegal transactions into normal functions so as to bring other investors in the same kinds of securities in competition therewith.

As to the investments by individuals in ordinary real estate mortgages, our prior discussion practically covers this situation. Individual investments in real estate mortgages is not at all competitive and is so incidental and remote as not to constitute substantial competitive moneyed capital.

Investments in government and municipal securities. In *Mercantile National Bank vs. City of New York*, 7 S. C., on pages 838 and 839, it is held that investments in municipal securities are not in competition with the banking business. The court says:

"Such securities undoubtedly represent moneyed capital, but, as from their nature they are not ordinarily the subjects of taxation, they are not within the *reason* of the rule established by congress for the taxation of national bank shares."

To the same effect is the *National Bank of Baltimore vs. Mayor*, 100 Fed. 24, pp. 29 and 31.

We submit that the millions of dollars invested by individuals in corporate and other interest-bearing securities are not competitive with national banks, and there are no individuals, either shown by the evidence or in the field of judicial notice, in Wisconsin engaged in the "business" of investing in securities similar to the banking business.

THERE IS NO EVIDENCE, NOR CAN THE COURT JUDICIALLY NOTICE, THAT THERE IS IN WISCONSIN ANY SUBSTANTIAL AMOUNT OF BUSINESS CARRIED ON BY—

LENDERS ON REAL ESTATE MORTGAGES.

Counsel contend, in line with the argument of the writer of the dissenting opinion in the state court, that the testimony of Mr. Liver shows that in the vicinity of Hartford (and he claims similar conditions prevail throughout the state), there are various concerns in the so-called "loan" business who are lending money on real estate mortgages in competition with national banks.

There is no testimony by this witness that anyone is engaged in the "loan" business excepting as a *lender on real estate mortgages*; i. e., there is no lender in short term paper like banks.

On pages 3 to 5 of this brief we have analyzed in detail all of the testimony on this subject and clearly shown that there is no sufficient evidence to show that these men are engaged in such a business of *lending their own money*. The clear meaning and intent of the evidence is that they are either mortgage brokers buying and selling mortgages for a profit, or that they are merely lending agents lending money for their customers for a commission or a fee. However, even if it does not *clearly* appear what the business method of these so-called lending companies is, it certainly is true that the indefinite character of the evidence is insufficient to establish the employment of capital in a substantial amount, competitive in character, so that the failure to tax the same constitutes a discrimination against national banks. To strike down a state taxing system on the flimsy evidence of this kind would be the height of injustice. If national banks want to show that lenders on real estate mortgages are doing a substantial competitive business as the basis of an attack

on their taxes, the proof showing substantial injury should be clear and unequivocal.

Chief Justice Vinje in his dissenting opinion claims that the majority of the court should have taken judicial notice that these "loan" companies, as he calls them (meaning lenders on real estate mortgages), were doing a vast amount of business throughout the state, and that their business was competitive. We broadly and flatly challenge this statement in so far as it is a statement of fact. The majority opinion has determined that there is no substantial amount of competitive business of this character in the State of Wisconsin, which determination is based on the evidence introduced, matters judicially noticeable, and the inhibitory effect of Wisconsin's banking law which prohibits all private banking business. Not only do we say that such a fact is not true, and not therefore judicially noticeable, but we claim that *the carrying on of such a business is practically impossible in Wisconsin*. A bank does business in which from 75 to 90 per cent of its capital is free money procured by its deposits. By means of the use of this free money it can maintain an organization and pay its overhead expenses out of a straight and pure *lending business* where the nature and object of the business is the *use of money* and the receiving of *compensation for the use of money*. No individual or any so-called "loan company" can set up or establish a *business* to meet the competition of banks of this character. Banks can lend at the same prices as the individual or loan company. No loan company can make any money in maintaining an expensive establishment, paying its overhead and loaning its own capital in competition with the banks under these circumstances. Take for illustration the plaintiff bank: its capital and surplus is \$100,000 (R. 31 and 32); total deposits \$950,000; time deposits \$322,000; savings deposits \$249,000; open account deposits \$318,000 (R. 34). Assume that it must pay on the average 3% on its time and savings deposits. We may also assume that it can loan this money

out at 6%. Therefore, with a capital of only \$100,000 this bank has \$571,000 which it may loan at 3% profit and \$318,000 free money which it may loan at 6% profit. Obviously no loaning company doing a *pure lending business* on real estate mortgages could maintain an establishment or do any substantial amount of business in competition with the bank in this situation. Therefore, they *cannot* do it and they *do not* do it. What they do is the very kind of transaction disclosed in this case wherever the *nature* of the transaction is shown as in the case of Russell, Sayles and others. These so-called "loan companies" referred to in vague and ambiguous terms by Mr. Liver and by the learned Chief Justice are *mortgage brokers*. They buy either in Wisconsin or in Minnesota and Dakota real estate mortgages at one price and sell them to their customers at another. They buy and sell the same as the stock and bond men buy and sell stocks and bonds. *They use their capital as a rotating fund for getting a quick turnover.* Any particular mortgage belongs to them for but a brief time. They do not invest in the mortgage for an interest return which is "compensation for the use of the money". They buy it to get the same turnover that a speculator in wheat does when he buys and sells wheat. His business is not competitive with the bank because banks cannot buy and sell for a profit.

Not only is the evidence insufficient in the respects pointed out and from the nature of things is the business practically impossible, but there are also other failures of proof as to the competitive character of any such a business. Assume for the purposes of argument that there is a *prima facie* showing of the employment of a considerable amount of capital in business generally denominated as "loan" business and that this means the lending on mortgages, it does not follow that the business is competitive.

Prior to 1913 national banks had no authority to lend money on real estate. In that year the federal reserve act

was passed giving them limited authority. This was amended in 1916 and again in 1918, and the statute in existence in 1921 is now set forth in Federal Statutes Annotated, Supplement 1918, page 472, being Section 24 of said act, a copy of which is attached hereto as "Appendix A".

Under this act a bank can only make loans on real estate under the following conditions:

- 1st. The lands must be improved and unincumbered.
- 2nd. They must be situated within a federal reserve district, or within a radius of one hundred miles of the lending bank.
- 3rd. Loans on farm lands must not exceed five years.
- 4th. Loans on other real estate than farm lands must not exceed one year.
- 5th. Loans on either farm or other real estate must not exceed fifty per cent of the actual value of the property.
- 6th. The aggregate of the loans of any bank on either farm or other real estate, must not exceed twenty-five per cent of the capital and surplus, or one-third of the time deposits of the bank, whichever amount is the greater.

From these statutory provisions it appears that the field within which banks may loan their moneys on or invest their funds in real estate mortgages is very narrow, and that their operations must necessarily be somewhat incidental as compared with the general and ordinary business of the bank. In the instant case the plaintiff bank's president testified that the loaning on mortgages was not a very large part of its business (R. 26). As the plaintiff bank's time deposits are the larger, one-third of \$322,000 (R. 34) or \$107,000 is the limit of its loans on real estate mortgages. The peak of plaintiff's mortgage loans at different times during the year 1921 (excluding those which are not authorized by the fed-

eral reserve act), as set forth in plaintiff's brief on pages 18 and 19, were as follows:

February 1, 1921.....	\$33,325.00
April 28, 1921.....	20,875.00
June 30, 1921.....	20,125.00
September 6, 1921.....	19,975.00

It appears that during the year 1921 the plaintiff bank purchased from the Wisconsin Securities Company in Milwaukee and resold to their customers and clients between \$30,000 and \$40,000 of real estate mortgages (R. 56). We assume that such of these real estate mortgages that were on hand at the periods set forth in the above tabulation were some of them. Therefore it is apparent that a very large part of its real estate mortgage business was that in which it was acting as a *broker or merchandiser* and was not a normal function of the bank. Therefore, the record as to this particular claim is barren of proof that it was in fact doing any substantial amount of lending on real estate mortgages. It is probably true that this question cannot be determined upon the *inactivity of any particular bank in exercising functions which are authorized by law*, but we do think that the conduct of a particular bank may reflect the attitude and disposition of others engaged in the same kind of business and furnish proof as to whether or not this department of the business is *substantial and important*, or whether it is *merely incidental and unimportant*. When we consider that the safety of banks lies in their having their securities liquid and in the form of temporary or short term loans, it is obvious that this phase of the banking business is hardly normal and nothing more than incidental.

In this connection we call the court's attention to the last clause of Section 24 of the Federal reserve act (Appendix A). It is there provided that the Federal reserve board shall have the power from time to time to add to the list of cities in which national banks shall not be permitted to make loans

secured upon real estate. It will be noted that in the first sentence of Section 24 the power given to national banks excepts banks in any "central reserve city" and the clause above referred to gives the board power to add to the list *other cities in which banks cannot deal in real estate. This provision indicates that the authority is somewhat temporary in character.* The disastrous experience of many western banks in the last few years in getting their securities all tied up in long term real estate mortgages (particularly state banks), illustrates the danger of any very large portion of the banking business being devoted to securities of this character.

We also submit that the moneys put by national banks into real estate mortgages is more in the nature of an *investment of its surplus* than it is the use of a part of its funds in a regular loaning business. The situation is comparable to the investing of its money in long term corporate bonds secured by trust deeds. The nature of this transaction is quite well described by the court in *People vs. Goldfogle*, 205 N. Y. S. 870, affirmed by Appellate Division 211 N. Y. S. 85 and 114, to-wit:

"It is not the *business* of a national bank, either by statute or in fact, to invest or deal in corporate bonds. They invest *surplus funds* in corporate bonds as a *mere incident* to the banking business, exactly as they may rent offices in a banking building to others. An individual who invests in corporate securities no more competes with the 'business' of a national bank than does the landlord of an adjoining office building."

It is a matter of common knowledge that banks do not care for real estate mortgage loans. Most such loans made by non-bankers are such as the banks cannot take either because the period of maturity is too long, the security is insufficient, lands are not improved or they are already encumbered by first mortgages. There is no proof in this case that in Hartford or elsewhere in Wisconsin any national bank has ever

been unable to get all the loans on real estate mortgages that it wanted. As a matter of fact, such loans as are taken by individuals or made by dealers in mortgages constitute the great field of investment which the bank either cannot take or does not want. Any competition is remote and incidental.

Most borrowers on real estate are farmers or those who are making building improvements on real property in the cities. Money loaned is frequently borrowed by the lender from the banks and then through the borrower the same immediately gets back into the stream of the money leading to the bank. Wisconsin made a heroic effort to tax mortgage loans but was obliged to repeal this law. The result of the law was that the lender was to provide in his note and mortgage that the borrower was to pay the tax. This shifted the burden on the borrower and resulted in the virtual exemption of the lender from the tax. Therefore, Wisconsin might well have been justified in exempting from any ad valorem tax every lender *who lends his own money on real estate mortgages*, whether it be a "loan company" such as Judge Vinje refers to or any other individual lending money on mortgages as a business and other than purely by way of personal investment. Partial exemptions of mortgages have been sustained by this court in *Hepburn vs. School Directors*, 23 Wallace 480. With reference to such an exemption it is said on page 485:

"It was evidently intended to prevent a double burden by the taxation, both of property and debts secured upon it."

The failure of Wisconsin to impose an ad valorem tax upon lenders upon real estate mortgages, either personal investors or those who do a "loan company" business, cannot be attributed to any intent to discriminate against banks. As heretofore noted, prior to 1913 national banks could not lend on real estate security. Wisconsin passed her law exempting moneys and intangibles from ad valorem taxation (inclusive

of loans on real estate mortgages), in 1909, at which time *national banks were not competitors with real estate mortgage lenders.*

The situation is similar to that in *First National Bank vs. Chapman*, 173 U. S. 205, where it was said:

"At the outset it was plain that the system of taxation adopted in Ohio was not intended to be unfriendly to, or to discriminate against the owners of shares in national banks; for, as observed by the State Supreme Court, that system was adopted *long prior* to the passage of the law by congress providing for the incorporation of national banks."

We submit that there is no proof, nor can it be judicially noticed, nor is it in accordance with the facts, that there is in Wisconsin to any substantial extent or degree whatever any amount of moneyed capital that is employed in the *business* of lending on mortgages in competition with the banks.

HOW OTHER MONEYED CAPITAL COMPETES

In the trial court Grove and Liver developed a theory as set forth on pp. 9 to 10 of this brief that the mere *withdrawal* of moneys by depositors from the bank for investment in even stocks and non-competitive securities constituted "competition"; that competition for capital and competition for money, regardless of the respective uses of the money, was within the meaning of the statute because it prevented the bank from having a chance to use such money for its deposits or having a chance to obtain such money on the sale of its stock. The Wisconsin supreme court effectually demolished this argument (R. 85 and 86). Because a depositor withdraws his money to engage in the pawn shop business and refuses to buy national bank stock, does not make this use of his capital competitive unless the business of a pawn shop is competitive with the banking business. Carried to its con-

clusion, a depositor or even a non-depositor who keeps his money in a stocking who yields to the wiles of an industrial stock salesman competes with the bank merely because he refuses to keep or put his money on deposit and refuses to invest it in bank stock, and instead invests it in industrial corporate stock, which investment is concededly non-competitive. The conclusion is clear that no capital in the hands of individuals is competitive so as to constitute "other moneyed capital" unless it is substantially used in the same manner and for the same purposes as is the capital of national banks.

UNDER WISCONSIN BANKING LAWS THERE CAN BE NO SUBSTANTIAL COMPETITION IN THE ESSENTIAL AND NORMAL PARTS OF THE BANKING BUSINESS.

The Wisconsin situation with reference to the banking business, and its historical relation to the Wisconsin tax systems, is so completely and satisfactorily set forth and discussed in the majority opinion of the Wisconsin Supreme Court (R. 74 to 76), that we feel it would merely encumber this brief to attempt to restate the argument or to add thereto, and therefore we respectfully refer the court to the Wisconsin court's opinion.

Counsel for plaintiff in error claim there may be banks of *discount* in Wisconsin notwithstanding the Supreme Court decides (R. 76) as follows:

"In the state of Wisconsin there is no person, firm or corporation receiving deposits, issuing bills or with power to issue bills, or engaged in the *business of discount* as carried on by banks except those organized under the banking laws of the state of Wisconsin or of the United States."

If this language means that under the Wisconsin law individuals *cannot* do the business of a *bank of discount*, then

this court is bound by the construction of the local statute. If the Wisconsin court knows judicially *as a fact that there are no banks of discount*, this court certainly cannot take judicial knowledge to the contrary, and even if the Wisconsin court erred in taking judicial knowledge of this fact, still the record is entirely barren of proof of any individual or individuals carrying on the business of a bank of discount.

In the *MacLaren Case*, 141 Wis. 577, referred to in the court's opinion, it was established that in Wisconsin there could be no ^{private} banks of issue or circulation nor of deposit. That case also decided that if any individual or private corporation was doing *any one* of the functions of a banking business he was violating the Wisconsin banking law. This proposition was based upon the decision of the New York Supreme Court in *Curtis vs. Leavitt*, 15 N. Y. 9, on page 56, wherein it was said:

"If a person should open and keep an office for receiving deposits payable on demand, he would carry on a well known branch of banking business, although he might use the deposits in speculation or other modes totally unconnected with banking. He would be a banker. So if he were to keep an office for issuing his own circulating notes, or for dealing in *exchange*, or for *discounting bills*, and *should actually carry on either of those operations without the others*, he would exercise a banking power, although confined to a single one."

The court's statement that there are no private individuals doing the business of a *bank of discount* certainly should be judicially noticeable under the economic situation. As we have shown elsewhere in this brief, no individual or corporation prohibited by law from the using of the word "bank" could take \$50,000 of capital and \$50,000 in surplus, own or rent the necessary building, pay all of the necessary overhead expenses of an organization and do a mere business of dis-

counting commercial paper or lending on short term paper in opposition to banks in competition with a bank of the same capital and surplus. The Hartford bank with its capital and surplus, its \$318,000 of free money of depositors and \$571,000 of time and savings deposits (presumably costing 3%) or a total of \$889,000, which it can put out to earn normally from five to six per cent, demonstrates that no individual or private corporation can possibly do a banking business under this situation where it cannot receive deposits.

We contend also that the banking statute set forth on page 14 of this brief clearly prohibits any individual or purely private corporation from doing any substantial part of the normal business of a bank, whether it be the functions of a bank of deposit, discount or any feature thereof. Section 224.03 makes it unlawful for any such person or corporation, unchartered as a national bank or under the state law, "to do a banking business". This is a general prohibition and applies to all of the substantial features of banking which would include the doing of a discount business or the lending on short term paper by opening up any place of business and doing the business as banks do. While Section 224.02 specifically provides that the soliciting, receiving or accepting of deposits as a regular business by a person or private corporation "shall be deemed to be doing a banking business", it is perfectly obvious that this section is not exclusive in its definition of the banking business nor is it intended by Section 224.03 that the limitation thereof shall be confined merely to such features of banking as are set forth in Section 224.02. The provisions of Section 224.02 are cumulative and intended merely as a more detailed statement and definition of certain features of the banking business in order to make it clear and certain that such features come within the general definition of the banking business.

We submit that the Wisconsin court's decision to the effect that private banking *in all of its features* is effectually prohibited in Wisconsin and that there are no individuals en-

gaged in any such features of banking "where the object of the business is the making of profit by its use as money", is amply justified and, therefore, there is not and cannot be any substantial and material competition with state or national banks in Wisconsin.

Outside and beyond its analysis of this general situation, the Wisconsin court took the precaution to analyze the specific items of proof in this case as to building and loan associations, acceptance companies, personal investments of individuals in bonds, mortgages and securities, etc., and properly came to the conclusion under an abundance of legal precedence and authorities cited, that such classes of business were not competitive in character and therefore were not to be considered.

On pages 60 to 66 of brief of counsel for plaintiff in error a strenuous effort is made to support the conclusion that because of certain statutory provisions there might or might not be in existence moneyed capital employed in competitive business and therefore the conclusion must follow that there is such business and that the Wisconsin court erred in taking judicial knowledge to the contrary. The fact that Wisconsin adopted Section 70.31 in 1923 so as to comply with the broadened provisions of the enabling act of congress in 1923 is unimportant. It seems childish to argue that because reference is made in this provision to the existence of competitive moneyed capital it must follow as a matter of law or the court must take judicial notice that a substantial amount of such moneyed capital exists. It is said that because Wisconsin has a statute authorizing land mortgage associations the Wisconsin court erred in declaring as a matter of common knowledge that no competitive moneyed capital exists in the state. It is true there is such a statute but there is no evidence in this case of the existence of any such association (witness Liver's statement that plaintiff bank deals in bonds of organizations like the *Wisconsin Farm Loan Association*, referred to on page 48 of brief of counsel

for plaintiff in error, does not constitute evidence of existence of *land mortgage associations*), nor is there any evidence whatever establishing their activities or the competitive features of their business. The same is true as to the statutes as to so-called loan and guaranty companies. The activities of these companies invite the investigation of facts; their competitive nature as a matter of law or the doing of any business thereunder do not appear on the face of the statute. The giving of the Railroad Commission of Wisconsin power to regulate the bond issues of corporations, and the reports of the commission showing millions of dollars of such corporate bond issues is hardly to be seriously considered. If such corporate bonds are sold, as we assume they are in 99 cases out of 100, purely for personal investment, then the fact referred to is entirely without significance. The making of such arguments as this clog the record and are not helpful to the court.

THE WISCONSIN COURT DID NOT ERR IN TAKING JUDICIAL NOTICE OF ANY MATTERS OR FACTS IN THIS CASE.

Examination of the Wisconsin court's opinion discloses that the situation is treated from two standpoints. First, the *evidence* received in the case; second, the situation as it existed under the Wisconsin tax and banking laws and the economic and legal result which the court could judicially notice follows therefrom.

The court found that under the prohibitory banking laws of Wisconsin there were in *fact* no persons or private individuals maintaining establishments or places of business who were carrying on the business of a bank of deposit, or the business of a bank of issue or circulation, nor any other features of banking, "where the object of the business is the making of profit by its use as money". We submit the Wisconsin court's conclusions are amply justified by the law and

by the record and that this court should recognize the Wisconsin court's decision as to what facts may be judicially noticed. Counsel argue that if the Wisconsin court judicially takes notice of certain facts and this court concludes that it has arrived at the wrong conclusion, it may take judicial notice to the contrary. We do not so understand the law.

In *Wear vs. Brewster*, 245 U. S. 154, the state court took judicial notice that the Kansas River was navigable as a matter of fact at Topeka. On appeal to this court it was argued that this was a question of fact that should have been submitted to the jury and that the state court was not entitled to take judicial notice thereof. This court said:

"If a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state we certainly cannot pronounce it error. In this respect it is a question of state law." (Citations.)

In *First National Bank of Garnett vs. Ayers*, 160 U. S. 660, the state court took judicial notice that the credits from which debts might be deducted did not constitute a large or even material part of the moneyed capital of the state. This court held that it could not take judicial notice to the contrary because there was no proof whatever upon the subject. This is a clear holding that where a state court takes judicial notice of the existence of any, or the quantity of, competitive moneyed capital, this court cannot and will not hold its finding in that respect to be error, or take judicial notice to the contrary, unless there is evidence in the record compelling a contrary conclusion.

In *New York ex rel Amoskeag Savings Bank vs. Purdy*, 231 U. S. 373, the New York state court held that "when all things are considered the rate even with the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state". It was contended in this court that this finding was based

upon no facts of experience or investigation and amounts to a pure surmise. This court said:

"We do not think it to be so lightly treated; but if it were, it still remains to be said that it was incumbent upon the plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares of national banks before calling upon the courts to overthrow it; and no such showing has been made."

Counsel makes a very interesting and remarkable argument to the effect that where four out of seven judges contend one way and three the other, the fact involved *cannot possibly be subject to judicial notice*. Mr. Voliva of Zion City still contends that the earth is flat. If he were the minority one of three judges his persistence in this contention would prevent the majority of the court in taking judicial notice to the contrary. We assume that if a court has power to determine a fact or a principle of law the fact that a minority may differ does not deprive the majority of its power. In Wisconsin the rule has been for many years that the question of negligence, even from undisputed facts, may be an issue of fact for the jury under these circumstances: Could reasonable men disagree as to the inference to be drawn from such undisputed facts? If they could disagree the issue was for the jury, if not, it was for the court. A most ingenious lawyer presented this argument ^{in the supreme court} in the supreme Court:—Twelve jurors agreed in favor of negligence; one trial judge disagreed and set the verdict aside; on appeal to the supreme court four judges agreed with the circuit judge and three with the jury; conclusion: as all were presumed to be reasonable men, it followed as a matter of law that a majority of the supreme court could not hold that reasonable men could not disagree as to the inference to be drawn. Of course the argument failed.

The supreme court has not committed any error in relation to judicial notice.

THE WISCONSIN STATUTE IS NOT VOID ON ITS FACE BECAUSE OF EXEMPTION OF INTANGIBLES FROM TAXATION. TO AVOID TAX PROOF MUST BE MADE OF EXISTENCE OF OTHER COMPETITIVE MONEYED CAPITAL IN SUBSTANTIAL AMOUNTS.

This proposition is discussed in the brief of counsel for the bank on pp. 23 to 36. The proposition amounts to this: Assuming that in 1921 there was not *in fact* a dollar of capital in Wisconsin substantially competitive with national banks; that by reason thereof there was *in fact* no discrimination against national banks by the exemption of intangibles; that there was no hostile intent against national banks by exemption of intangibles; *nevertheless*, they say the court should declare the Wisconsin bank tax statute, and also the tax, void merely because *another statute* exempted intangibles from taxation.

Counsel argues the case as if the Wisconsin bank tax statute (Appendix C—Brief of Plff. in Error, p. 79) said on its face, "The capital stock of national banks shall be taxed on an ad valorem basis at the same rate as other property; 'other moneyed capital' shall be exempt from taxation."

The Wisconsin bank tax statute does not so provide. In and of itself alone it is a mere exercise of a power to tax bank stock on an ad valorem basis pursuant to the enabling act of congress, Section 5219. It in itself contains no provision as to how other moneyed capital or how intangibles or any other species of property shall be taxed. As we have heretofore shown in a companion section in the same chapter relating to "assessments", there was for years a section providing for the taxation of moneys, credits and intangibles, which section was, however, repealed in 1909 when the Wisconsin income tax law was adopted. This exemption statute does not exempt "other moneyed capital"; it merely exempts moneys, credits and intangibles. So much of the moneys, credits or intangibles as are *not* "moneyed capital" are, of

course, not affected by the exemption. Therefore as *some part* of the exempted species of property may or may not be "moneyed capital", the *facts* must be shown in any particular case in order to determine the effect of the exemption statute.

This distinction should be borne in mind in considering the Ayers and the Chapman cases hereinafter discussed. Unless it is *impossible* for a situation to exist where there shall be no substantial amount of competitive moneyed capital, this argument does not appeal to one. No national bank can be hurt if its only real competitors are state banks taxed like itself simply because there may be a statute which exempts "moneys, credits and intangibles" when the holders of the same are not real or substantial competitors. If the bank is not hurt either in fact or in law, then it is not discriminated against. As this court said in the Mercantile Case:

"The key to the proper interpretation of the act of congress is its policy and purpose."

The policy and purpose of the act is to protect national banks against prejudicial discrimination through the exercise of state taxing powers.

We submit that there is a complete answer to counsel's argument as follows:

It is elementary that no person or corporation has a standing in court to set aside a state law as unconstitutional unless it can show that it is injured thereby. A general citation of authorities is unnecessary. If in the given case there be neither proof nor presumption that any part of a mass of moneys, credits or intangibles in Wisconsin are substantially competitive with banks, then the plaintiff bank has not shown a *status* sufficient to entitle it to attack this law as unconstitutional. In *Supervisors vs. Stanley*, 105 U. S. 305, a state statute did not give to bank stockholders the same right to deduct debts as to the owners and holders of credits and other intangibles and it was claimed that by reason thereof the entire statute was void. It was held that unless

the bank stockholder could show that he had in fact some debts to offset, he was not injured and could not complain. The following from the court's opinion is pertinent:

"What is there to render it void as to a shareholder in a national bank, who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others? *Why should he invoke the protection of the act of congress in a case where he has no rights to protect?* Is a court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no rights of theirs?"

In *Austin vs. The Aldermen*, 7 Wallace 694, the following is the syllabus and well states the rule involved:

"If a State statute (taxing national banks), passed in professed exercise of an authority given by Congress to the States to pass such a statute, does not deprive, contrary to the act of Congress, *the party to the suit*, of any right, nor work, as to him, any effect which the act of Congress forbids, this court cannot, on the case being brought here by such party on the ground that the State statute violated the act of Congress, declare the State statute void."

The situation in the Austin case was as follows:

Section 5219 requires, as a condition of the exercise of tax authority by the states, that the tax must be levied at the site of the banking association and not elsewhere. Massachusetts, either inadvertently or in defiance of this statute, passed an act taxing the shareholders of banks *in the respec-*

tive cities and towns where such shareholders resided. Austin, the complaining stockholder, lived in Boston, which was the location of his bank. He objected to the tax because the state law *on its face* violated the federal act as to the *situs* of taxation. The court very properly answered that inasmuch as he resided in the same city as the bank and his bank was taxed at the residence of the bank, he was therefore not hurt by any invalid portion of the statute and would not be heard to complain.

The same principle is applied by this court in *Citizens National Bank vs. Kentucky*, 217 U. S. 443. There it was held that only non-resident stockholders in a national bank could complain of the supposed invalidity, as to them, of the retroactive feature of the Kentucky act of March 21, 1900, making it the duty of certain officers of the bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency. The court applies the rule of the *Austin* and *Stanley* cases above cited.

These authorities amply justify the conclusion that if the plaintiff bank, or any bank maintaining suit in Wisconsin, could not prove that there was a substantial amount of competitive capital among the moneys and intangibles exempted by a separate statute, it would have no standing in court to make complaint or to claim that the statute is void on its face.

Counsel seem to rely upon a more or less inapplicable statement made by the Supreme Court of Wisconsin in its opinion. In the court's opinion (R. 76), the court justifies its disregarding the general findings of the trial judge and states as one ground "the further reason that the law under consideration is one of state-wide application." The court then says:

"The court is required to take judicial notice of *general conditions* to which the law applies. It is either valid or void in total. Its validity can be made to depend upon a particular finding of fact relating to the conditions in a single locality so that, assuming it to be ad-

ministered as written, the law might be valid in one place, void in another, or valid at one time and void at another."

Of course if this rule, in its fullest sense, was applied under all circumstances it would run counter to the rule of this court in the Austin and Stanley cases. The occasion for the latter part of the court's statement was the thought that it was being contended in the state court that the plaintiff had to prove that there was competition in the "particular" locality of the "particular" plaintiff bank, and if it failed in such proof and statute, and therefore the tax, was valid in that locality. The court misapprehended the contention, which was one first orally made on the argument. The contention was not that the statute would be *valid* in a particular locality and invalid in others, but that in the *particular case the particular plaintiff* would not have shown that he was injured. Of course, and it was not contended otherwise, if the plaintiff had assumed and undertaken the burden of proving a *state-wide condition of affairs* and to have shown the general conditions applicable, of which the court says that it may take judicial notice, then it might well be that the plaintiff might recover on the ground that the entire statute was void, although this seems somewhat inconsistent with the decisions of this court. Nevertheless, we insist that this statute is not void *on its face* unless there is ascertained to be, either by proof, inference or judicial notice, a substantial amount of competitive capital among the class of property exempted from taxation by the statute objected to.

We proceed to examine the cases relied upon by counsel and we confidently claim they have no bearing whatever upon the proposition. At the outset we desire to object to the language loosely employed by counsel in discussing this subject and in their discussion elsewhere in the brief. On page 23 they say that it became "a purpose of the state to exempt all 'moneyed capital' in general". Again, on the same page:

"We now find a general purpose to exempt all *moneyed capital* from taxation on that basis". The Wisconsin exemption statute does not exempt *moneyed capital*; it exempts moneys, credits and intangibles. It is begging the question to say that these are either necessarily or in fact moneyed capital. They may all be, or a part may be, or no part may be moneyed capital.

After general observations counsel enumerate a certain class of cases which they claim sustains the proposition contended for. That is to say, cases which hold that a statute or a tax will be set aside *without proof either as to amount or as to competitive character of moneyed capital*.

The case of *Lionberger vs. Rouse*, 9 Wallace 468 has no bearing. In that case the court held that the federal congress did not contemplate that the state should do the impossible. At the time of the enactment of the federal act there were two banks in the state which under contract with the state could only be taxed in a limited amount. This court held that the recognition of the validity of such contract and the limited taxation of these two particular banks, was not a violation of the federal enabling act. Citation of a case in this manner is but a waste of the court's and counsel's time.

The case of *People vs. Weaver*, 100 U. S. 539 must be construed in the light of the later cases and the comments of the court on the Weaver case. The case involved the question of the validity and effect of a statute which permitted the holders of personal property and credits to deduct their debts without giving the same privilege to the holders of national bank stock. The assessing authorities assessed Weaver \$38,250 on account of his ownership of the bank stock. He made an affidavit that after deducting all of his debts from the value of his personal estate, the balance would not exceed one dollar. *The deduction* was denied in the state courts. The questions raised in the cases hereinafter dis-

cussed were evidently not raised in this case and the court says that the statute of New York is in conflict with the act of congress and reversed the judgment for further proceedings. A particular explanation of this holding will be set forth in connection with the Amoskeag case hereinafter discussed.

In *Supervisors vs. Stanley*, 105 U. S. 305, the question came up again from the state of New York. A large number of shareholders who had paid a bank tax made an assignment of their claims to him. Unfortunately the plaintiff did not prove that his assignors, or any particular ones of them, or at least all of them, had any deductible debts or that they were injured in anywise by the statute. Held that the statute itself was not, however, rendered void by reason of the conflict and if the stockholder had no debts to deduct then the assessment is valid and he cannot recover the tax; if he has debts the assessment is only voidable and the tax will be computed according to the proper deductions.

The court discusses quite fully the case of *Austin vs. The Aldermen*, 7 Wallace 694, hereinbefore cited, and states that the argument as there made is pertinent here. The court says with reference to the Austin case:

"The court evidently went upon the principle that the statute was only void as against the act of congress in cases where someone was injured by the particular matter in which there was such conflict. The case seems to us directly in point."

The *Weaver* case is referred to as not holding to the contrary. (See page 315.)

Counsel on page 29 of their brief say that this case was decided on the theory that the law denying the right of offset was void on its face and that by the same reason if the law entirely exempted other moneyed capital, it would be held void on its face. This is so obviously a misconstruction of

the case, especially in the light of the later cases, that no further comment is necessary.

Hills vs. Exchange Bank, 105 U. S. 319 and *Evansville Bank vs. Britton*, 105 U. S. 322 were companion cases decided at the same time as the Stanley case and adopt the rule thereof and go no further.

In the *Britton case* the bank still insisted on the idea that the act itself was void but this court held that it decided otherwise in the Stanley case and adhered thereto. On page 30 of counsel's brief they say that the effect of the decision is to hold, so far as the limitation on the right of offset was concerned, that the statute was void on its face and that there was no necessity of proof. Comment on this conclusion is unnecessary.

Whitbeck vs. Mercantile Bank, 127 U. S. 193. This case merely follows the Hills case and has no different force or effect. The only distinguishing point raised was as to whether or not the objecting stockholder had lost his rights by failing to make *demand for deduction* at the proper time. We cannot understand counsel's persistent claim as to what this and other decisions hold. Counsel is equally wrong in holding that the Chapman case placed any such construction upon the Whitbeck case.

We now refer to *First National Bank of Garnett vs. Ayers*, 160 U. S. 660 (which is *not* cited in plaintiff's brief) in order to give the historical line-up of these decisions and to understand their meaning.

In this case the complaining stockholders made proof that they had debts to deduct. It, however, appeared that in Kansas among the mass of credits which might constitute moneyed capital there was only a limited class which were subject to deduction for debts. This appears to be the first case subsequent to the case of *Mercantile Bank vs. New York*, 121 U. S. 138, in which the principle therein laid down was applied to this class of cases. After discussing that case this court held that inasmuch as it did not appear in the record,

and inasmuch as this court could not take judicial notice, that the amount of moneyed capital from which debts might be deducted, as compared with moneyed capital invested in the shares of banks, was so large and substantial as to amount to an illegal discrimination against banks, the court could not declare the tax against the bank stockholders unlawful. On the question of judicial notice this court held that it could not take judicial notice of the facts in respect thereto and referred to the fact that the state court had determined of its own knowledge that such other credits from which debts might be deducted did not constitute a large or material part of the moneyed capital of the state, and in fact noticed that the credits from which deductions could not be made constituted the great bulk of the moneyed capital in the state. This court would not, however, override the decision of the state court on these points. It is indicated that if the question of what facts might be judicially noticed is a matter of doubt or uncertainty or dispute, that proof must be taken whereby the facts constituting discrimination might be clearly disclosed. The court says:

"The single fact that the statute of Kansas *permits* some debts to be deducted from *some moneyed capital*, but not from that which is invested in the shares of national banks, is not sufficient to show such violation."

So we say the *mere fact* that there is a statute which exempts moneys, credits and intangibles, (especially where it affirmatively appears by proof in the case that a large and substantial part of such moneys, credits and intangibles is not and cannot be "moneyed capital"), under the decisions of this court, does not make either the statute or the tax invalid, but there must be proof that the quantum of real moneyed capital exempted by the statute is sufficient to be relatively important and to constitute a substantial discrimination.

The case of *First National Bank vs. Chapman*, 173 U. S. 205 is almost identical in facts and in rulings with the Ayers case and there is no ground for distinction. The court says:

"It is thus seen that there are large and unknown amounts of what are in the act termed 'credits' which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens included in the term 'credits' (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are therefore unable to say whether there has or has not been any material discrimination such as the federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and those of *Bank vs. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, *First Nat. Bank of Aberdeen vs. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, and *National Bank of Commerce vs. City of Seattle*, 166 U. S. 463, 17 Sup. Ct. 996."

Counsel's observation on page 30 of their brief as to what the Chapman case shows with reference to the meaning of the Whitbeck case is not accurate. In the first place, this court says the Whitbeck case went off *principally* on the question of discrimination by wrongful administration of the law in the matter of valuation and equalization. The court then emphasized that "the point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness".

Therefore the court holds that the Whitbeck case is not an authority against the decision in the instant case.

Counsel's analysis of *Amoskeag Savings Bank vs. Purdy* 231 U. S. 373, is not convincing. After having made the premise earlier in the brief that the Weaver case established the principle they contend for, they attempt on pp. 31 to 32 to distinguish the later Amoskeag case by pointing out that while in the Weaver case two classes of property were valued and rated by the same method, a different method was employed in the later case. They concede that in the later case the court properly held that an issue of fact might be presented as to whether discrimination actually results from the operation of the law. They entirely overlook the fact that in the Chapman and Ayers cases, much later than the Weaver case and after the Mercantile National Bank case, the court held in cases typical of the Weaver case that the question of actual discrimination in these kinds of cases might and did present an issue of fact.

In the Amoskeag case, on the question of what was judicially noticed by the court below and what the plaintiff must prove, this court said:

"Plaintiff in error contends that the statement of the New York court that 'when all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state,' is based upon no facts of experience or investigation, and amounts to a pure surmise. We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no showing has been made."

Inasmuch as counsel apparently make no claim from the holdings in *Covington vs. First National Bank*, 198 U. S. 100 and *Citizens National Bank vs. Kentucky*, 217 U. S. 443, no comment is need.

In *Eddy vs. First National Bank of Fargo*, 275 Fed. 550 it is true that the court indicated that in case of partial exemptions from taxation the question of whether there was substantial discrimination might be a subject matter of inquiry. However, the case went off on the proposition that the *actual proof* showed that in the city of Fargo the moneyed capital of individuals amounted to about \$2,000,000 and the moneyed capital of banks to about \$1,383,023 and that about the same relative proportion existed throughout the county and the state. The court in an aside said that these facts might be said to be in accord with common knowledge. That case, however, loses all of its significance when it appears that it is based upon the supposed rule announced by this court in the Richmond case. At the time of the decision in the Eddy case it was contended by many and evidently thought by Judge Hook, that the Richmond case held that all *mere private and personal investments* in the hands of individuals constituted "other moneyed capital." We are informed that the record in the Eddy case made no discrimination between investments and credits of this character and other credits or investments which might be truly competitive. Therefore this case loses its significance in the light of the decision of this court in the case of *First National Bank of Guthrie vs. Anderson*.

Counsel next makes the proposition (brief page 32) that cases dealing with partial exemption have no weight in opposition to the cases cited by them. Inasmuch as we have shown that the cases cited by them do not support their contention, it does not seem material to discuss the cases of partial exemption. We contend, however, that the principle involved in the cases of partial exemption affords a substantial analysis. The principal thought in those cases is that whatever

the state legislature does will not be deemed a violation of Section 5219 unless it works a substantial injury to someone. The authorities cited in the first part of the argument on this subject sustain the proposition that a stockholder of a national bank cannot complain against a state statute unless he can show some injury and these cases are in line with the principle of the partial exemption cases.

Therefore, we confidently contend that inasmuch as it is not *proven* in this case, nor is it judicially noticed, that there is any substantial amount of competitive moneyed capital in Wisconsin, the mere existence of an exemption statute exempting all credits and intangibles (regardless of their character as "moneyed capital") does not in itself make void on its face the Wisconsin statute taxing the shares of national banks.

PART II.

HISTORICALLY AND ECONOMICALLY CONSIDERED, THE "WISCONSIN SYSTEM" CONSISTING OF THE PROHIBITION OF ALL PRIVATE BANKING, THE TAXATION OF ALL INCOMES AND THE EXEMPTION OF MONEYS, CREDITS AND INTANGIBLES FROM AD VALOREM TAXATION, NEITHER INJURES, NOR DISCRIMINATES AGAINST, NATIONAL BANKS.

We believe that the operation of the fundamental principles of economics in the field of taxation under consideration should not be ignored by this court.

The taxation of money and intangible property as contended for by counsel for plaintiff in error was never possible of actual realization in any state in the union. It would be impossible today for any state to devise administrative machinery adequate to enforce taxation of money and intangible property as counsel for plaintiff in error contended.

must be taxed as a condition precedent to imposing an ad valorem tax upon shares of stock of national banks under 5219, United States Statutes. This class of property is not being taxed, as counsel contend it should be taxed in order to meet the requirements of Section 5219, in a single state retaining the general property tax. This is not due to maladministration of law. It is due to the fact that it is inherently impossible to enforce an ad valorem tax upon money and intangible property not engaged in the business of organized and regulated banking.

Much has been said in this case about common knowledge. We venture to assert that nothing is more completely a matter of common knowledge than the inability of governments to subject money and intangible property to taxation by means of a general property tax. We approve the statement made in the Minnesota Case, submitted herewith, by the Attorney General in his brief in the State Court, to-wit: "Such an inherent human inability is a greater bar than any mere legal obstacle or any constitutional prohibition".

Like every other state in the Union, Wisconsin from statehood down to 1911, maintained the general property tax with unimportant exemptions. The general property tax demanded the taxation of all wealth, and all evidence of wealth, at the same rate or, as many people expressed the underlying idea upon which this scheme of taxation was based, "all property must be taxed on the same basis and at the same rate." The apparent equality and justice of this proposition appealed to those who failed to recognize the fact that this plan of taxation was inherently defective and entirely impossible of enforcement. For years most people appeared to be blind to the failure of all efforts to successfully administer this system of taxation. In the early days of the Republic when practically all wealth consisted of real estate and certain tangible property easy to discover and easy to appraise the general property tax provided a satisfactory

system of taxation. Sec. 5219, U. S. Statutes, as amended in 1868, remained in force without amendment until 1923. In 1868 it was not evident to statesmen and legislators that the general property tax so far as it applied to money and credits was doomed to complete failure. However, this fact became apparent a few years later.

An era of industrial development and commercial expansion without precedent or parallel was inaugurated in the seventies. This period was marked by social, industrial and financial changes entirely beyond the comprehension of legislators of an earlier day. A vast system of credits was developed. Holdings in stocks, bonds, debentures, notes and securities too numerous to mention or describe, attained enormous proportions. Money on deposit in national, state and private banks reached staggering totals. Money and all forms of intangible property multiplied with great rapidity. All of this money, and all of these investments, were universally declared to be taxable and efforts were made in every state to tax them. Drastic legislation was enacted by state legislatures. Severe penalties were decreed all for the purpose of placing this property on the assessor's books for taxation. Different states resorted to different methods. Various forms of inquisition and espionage were set up. Tax ferrets were employed. Special penalties for perjury were provided. The result in every state was absolute failure. Many of these efforts to enforce the general property tax by legislation were continued long after it was clearly evident that this tax was fundamentally wrong in theory and impossible of enforcement. As we shall later show the failure to enforce the general property tax against moneys and credits was not due to inefficient enforcement. It was directly due to inherent defects in the system itself. The general property tax was successful as applied to real estate and improvements thereon and to certain simple taxable personal property such as farm animals, farm machinery, wagons, carriages, trucks, etc. However, it was a total failure insofar

as it attempted to subject moneys and credits or intangibles to taxation. Prior to the enactment of the Wisconsin Income Tax Law it was literally true in every state that the tax laws subjecting money and credits to taxation were held in utter contempt. This fact was recognized by the Wisconsin Tax Commission in its report for the year 1903. On page 119 of this report we find the following:

"Laws which are fundamentally wrong are incapable of substantial enforcement among free and enlightened peoples, and the fact that the assessment laws under discussion have never been effectively enforced is evidence that there is some radical defect in the principle upon which such laws are founded. It would not be wholly correct to assert that in their practical rejection of such laws the people and their assessors have shown themselves wiser than their law makers; but, is it not true that by instinct or intuition they have arrived at correct conclusions which have not as yet been consciously perceived by the majority of legislators."

Charles J. Bullock, Professor of Economics and a tax authority, described the situation in an address on the taxation of intangible property delivered before the Second National Tax Conference at Toronto, Canada, October 6, 1908. He said:

"It is notorious that personal property largely evades taxation, and there is statistical evidence that this evasion is progressive particularly in the case of intangible wealth."

Prior to 1911 there was complete unanimity of opinion on this subject on the part of students of economics, finance and taxation. All accepted authorities were in accord. They all held that moneys and credits were not being taxed and that they could not be taxed by any system of direct taxation. It would serve no useful purpose to encumber this brief with

quotations from Seligman, Adams, Wells, and other nationally known authorities whose names will be readily recalled by members of the court. The following quotation from Professor Ely, appearing on page 78 of the Proceedings of the Third International Conference on State and Local Taxation, is typical:

"The one uniform tax on all property in direct taxation never has worked well in any modern community or State in the civilized world, though it has been tried thousands of times, and although all the mental resources of able men have been employed to make it work well. I have read diligently the literature of finance to find an example, but in vain; and lest this should not be sufficiently trustworthy, I have made it my business, in my capacity as tax commissioner, to visit typical states and cities and to make inquiries in person of citizens as well as of officials trusted with the administration of the laws. I have visited Charleston, S. C.; Savannah, Atlanta and Augusta, Ga.; Columbus, Ohio; Madison, Wis., and Montreal and Quebec, Canada. And the result has been abundantly to confirm all that I have said about the impracticability of the one uniform tax upon real and personal property."

The Third International Tax Conference at Louisville, Kentucky, Sept. 21-23, 1909, passed the following resolutions:

"WHEREAS, the working of the general property tax depends upon the efficiency and thoroughness of its administration, which in most states is confined to officials locally elected or appointed, and

WHEREAS, the general property tax as thus administered is severely criticised by students of the subject as unjust and unequal between taxpayers in the same district.

RESOLVED, that a committee of three members be appointed by the Executive Committee of the International Tax Association to investigate whether the failure of the general property tax is due to inherent defects in the system itself or to weakness in its administration, and to report to the next annual conference its conclusions upon the subject, including in the investigation if deemed necessary the further question of substituting an income tax in whole or in part for the personal property tax."

This resulted in the adoption of the following resolution by the Fourth International Tax Conference held at Milwaukee, August 30, to September 2, 1910:

"WHEREAS, a committee was appointed under a resolution adopted at the Louisville Conference to inquire into the causes of the failure of the general property tax,

RESOLVED, that the Conference endorses the conclusions of the said committee and finds that the general property tax under the higher rates of taxation caused by the increase of public expenditures in the United States has broken down so far as it applies to personal property, and

RESOLVED, That the Conference finds that the taxation of personal property has not been more successful under strict administration than under lax; that states which have modified or abandoned the general property tax show no intention of returning to it; and that states where the general property tax is required by constitutional provisions there is a growing demand for the repeal of such provisions, and

That the failure of the general property tax, in its application to personal property, is due to inherent defects in its theory; that even reasonably fair and effective

administration is unattainable and that attempts to strengthen such administration simply accentuates the inequalities and unjust operation of the system."

This conference was attended by authorities and experts on taxation from thirty-five states, two provinces of Canada and sixteen leading American universities.

A study of the reports of the Wisconsin Tax Commission from 1901 to 1909 clearly indicates that those in responsible charge of taxation in the state of Wisconsin were conscious of the fact that money, credits and intangibles of all kinds were not bearing even a small part of their just share of the burden of taxation; that this class of property did not bear any appreciable part of the burden. As early as 1901 the Wisconsin Tax Commission said:

"The time is perhaps not far distant when a better understanding of these questions will be had and when there will be a more distinct demand than now exists that much intangible property so called which under existing practice is virtually exempt, shall be made expressly exempt from direct taxation. * * * It may be remarked in this connection that a transition from virtual exemption under existing practice to substantially the same exemption by legislative act, would involve no disturbance in industrial or commercial conditions."

In 1903 the Wisconsin Tax Commission made an exhaustive report on the entire subject. This was brought about in part as the result of an effort to tax mortgages in the state of Wisconsin inaugurated in 1902. Without reviewing this effort, or subsequent legislation on the subject, suffice it to say that the effort resulted in failure. In its summary

of conclusions contained in the 1903 report, the Wisconsin Tax Commission said, page 139:

"It is scarcely necessary to make a formal statement of our final conclusions. It seems very clear that the only just and rational solution of the problem as to taxation of credits is to cease all attempt to tax them—in other words, to exempt them from taxation. This would not be an exemption in any true sense, for there is really nothing to exempt. Credits are property for purposes of taxation, by legal fiction only. The proposition therefore is not the exemption of the property, but to abolish the fiction."

In its report for 1909, page 13, the Commission says:

"As to moneys and credits most assessors seem to have abandoned all efforts to assess them. This is true as a rule throughout the state."

In 1916 Robert Murray Haig, Ph. D., Columbia University, published a history of the general property tax in Illinois. According to a law then in force in that state all persons not included in the legal definition of "bank", "bankers", "brokers" were required by law to list whatever money they possessed under this item. This was practically a tax upon bank deposits in the hands of private individuals. Therefore it was possible to test it by comparing assessed values with bank deposits. The following figures show how the law operated in Cook County, including the city of Chicago:

	Assessed Value	
	Bank Deposits	of Money
1910	\$521,099,660	\$1,719,365
1911	555,610,648	3,733,947
1912	622,324,029	2,173,277

Credits were also separately assessed and for the year 1912 in Cook County, including Chicago, the total assessed value

of all credits exclusive of moneys was only \$1,257,024. Data and statistics of this striking and illuminating character could be cited without limit.

Knowledge of this state of affairs was not confined to students of taxation. Courts were conscious of the failure of all efforts to tax moneys and credits. In *National Bank vs. Mayor, et al.*, 100 Fed. p. 24 at page 27 :

"The taxation of personal property has always and everywhere been a vexatious problem. Horses and cattle, wagons and carriages, the implements of husbandry and household furniture—all things, in fact, which are visible, and cannot readily be concealed, including therein shares in incorporated companies, which may be compelled by the law creating them to make returns—are within comparatively easy reach of the tax assessors. But the great mass of personal property, in which the wealth of a country is invested, consisting of bonds and other evidences of credits, which can be readily hidden, escape the eye of the assessor, and nothing is more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy or equality, and this is not for want of long-sustained and earnest effort to accomplish it. There is a monotonous uniformity in the reports of the failures of every system attempted, however stringent may be the legislation, or however arbitrary or despotic may be the powers with which the assessors may be clothed. The heavy hand of the tax-gatherer always falls upon the widow and the orphan, upon trustees and guardians, whose estates are required by law to be revealed to the courts of probate and upon those only whose consciences are unusually scrupulous, and who, having least experience in business, are least able to bear the burden, while the most inadequate returns are invariably made by the rich, who are usually most ingenious in evasion, and most

fertile in expedients to escape taxation. The result is that always and everywhere no appreciable part of such intangible property is reached by laws, however ingeniously framed or severely enforced."

Chief Justice Winslow in the opinion of the Court in the Income Tax Cases, 148 Wis. 456, at page 505, said:

"By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; * * * That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act."

The legislative history of Chapter 358, Laws of 1911 (Wisconsin Income Tax Law), fully confirms the foregoing statement by Chief Justice Winslow.

This legislation was authorized by an amendment to Section 1, Article VIII of the State constitution of Wisconsin which became effective in 1908. A Legislative Committee appointed in 1909 was authorized to investigate and report on the entire subject in 1909, under Resolution No. 8 Laws of 1909, p. 806.

This Committee did its work thoroughly. After careful study and consideration and after holding hearings in various parts of the state, it submitted its report to the Governor and in turn the Governor submitted the report to the legislature. The report was printed in full in the Assembly Journal of Feb. 9, 1911. The following excerpt from the report is germane to this discussion:

"The joint committee appointed by the legislature of 1909, in pursuance of joint resolution No. 8, to 'investigate the subject of an income tax and to report a bill or bills covering that subject', have the honor to report.

Failure of Personal Property Tax.

The members of the committee at the very outset fully realized the difficulty of the task before them. They also realized the pressing necessity for relief from the present personal property tax, and its inefficient administration. The large popular majority in favor of the income tax amendment to the constitution is akin to a mandate from the people that an income tax be added to our tax system.

The committee gave hearings in several of the leading cities of the state, and collected such materials as it could conveniently reach for its own information.

It seems to be practically agreed by students of taxation that the personal property tax as we have it is a failure, not only because of inefficient administration, but because of inherent defects in the theory upon which it is founded. In theory the income tax meets with universal approval, the real problem being in its application and administration."

The entire matter was referred to a Special Joint Committee of the 1911 Legislature. After holding many hearings this committee on April 28, 1911, reported a bill which was finally enacted without many material modifications. This committee submitted its arguments in support of the various sections of the bill in the shape of "Notes" to each section. The following excerpt from the notes found on page 1, of the committee's report, are of interest:

"A few reasons why we should begin to employ income as a measure of the taxpayers' ability to contribute to the support of the state are the following:

1. Statesmen and students agree that in so far as it applies to personal property (in the words of Professor Seligman) 'the general property tax as actually administered today is beyond all peradventure the worst tax known in the civilized world.'

2. The modern industrial movement has not only greatly increased stocks, bonds, credits and all forms of intangible personal property which so easily escapes taxation, but it has given rise to a constantly increasing class of citizens who receive their livelihood, not from property at all, but from salaries and professional sources and cannot be made to pay their just share of taxes by the general property tax.

3. To employ income as the basis of taxation will enable the State to reach all classes of its subjects and require each to pay in proportion to his ability."

The bill reported by this Committee was finally adopted and subsection 10, Section 70.11, Wisconsin Statutes 1925, exempting

"All moneys or debts due or to become due to any person and all stocks and bonds, including bonds issued by any county, town, city, village, school district or other political subdivision of this state, not otherwise specially provided for."

was adopted as an amendment to Section 1036, Wisconsin Statutes 1909.

This law exempted the income of state banks, national banks, mutual savings banks, trust companies, mutual loan corporations or associations organized under Chapter 185, Laws of 1911, from payment of an income tax. All other persons, firms and corporations were required to pay such tax at a graduated rate from a minimum of 1% to a maximum of 6%, the maximum rate for corporations applied to all taxable income over \$6,000.00 and the maximum rate for

individuals applied to all taxable income over \$12,000.00. The shares of all such banking associations were taxable as personal property as provided in Section 70.37, Laws of 1921, which section specifically provided that:

"In the assessment of shares of stock in any bank the assessor shall first determine the total true cash value of all such shares according to his best judgment. If the building in which such bank maintains its offices and transacts its business be owned by such bank, the assessed value thereof, including the land upon which it is located, if owned by such bank, not exceeding the amount for which such building and land are carried as an asset upon the books of the bank, shall be deducted from the total value of such shares. The remainder of such total value or the whole thereof, if the bank does not own such building, divided by the total number of such shares, shall be taken as the valuation for assessment of each of such shares. No deduction shall be made on account of any other real estate in the assessment of the shares of stock of any bank."

It will be noted that this provision of the Wisconsin Statutes provided for the deduction of the book value of all real estate owned and used by banks in carrying on their business. Exhibit 4 (Transcript of Record, page 66) shows that the book value of plaintiff's banking house in 1921 was \$21,000.00 and that its capital stock was \$50,000.00. Prior to 1903 Wisconsin had followed the practice of assessing the real estate separately and also assessing the capital stock of banks at its true cash value. Chapter 72 Laws of 1903 changed this practice. This fact is referred to merely as evidence of the fairness exhibited by the state of Wisconsin toward national banks in developing its system of taxation. Of course, some national banks and some state banks transact business in leased buildings and upon leased land, but such instances are very rare. The report of the Com-

missioner of Banking for 1921 shows that the value of real estate owned by national banks in Wisconsin was in excess of one-third of the capital stock of such banks for that year. The figures are as follows:

1921	
Banking House	\$ 9,448,000
Furniture and Fixt.	1,096,000
<hr/>	
Totals	\$10,544,000
Capital stock paid in.....	\$24,285,000
Surplus	12,766,000
Undivided Profits	7,074,000
<hr/>	
	\$34,125,000

Therefore, Wisconsin scrupulously observed the requirements of Section 5219 so far as they are applied to the taxation of real estate owned by national banks.

In order to understand the effect of the enactment of Wisconsin's Income Tax Law in 1911 and the exemption of moneys and credits complained of, it is necessary to study the banking laws and regulations of the State of Wisconsin in force at this time. The Wisconsin statutes relating to banking then in force and the construction placed upon them by the Supreme Court of the State of Wisconsin is summarized in the opinion of its Supreme Court by Mr. Justice Rosenberry in the case at bar. (Transcript of Record, page 68.)

We contend that under the banking laws of the State of Wisconsin, the enactment of the Income Tax Law of 1911 and the statutory exemption of moneys and credits from ad valorem taxation which was nothing more or less than a legislative recognition of the fact did not, so far as national banks in Wisconsin were concerned, frustrate the purpose of Section 5219 or tend to impair the efficiency of national banks to perform and discharge the functions for which they were established. On the contrary, this legislation was in fact

beneficial to both state and national banks. It was accepted by the banks without question until after the decision of this court in *Merchants National Bank vs. Richmond*, 256 U. S. 635. Then, for the first time, the taxation of national banks under this system of legislation was challenged and attacked.

Let us now examine the results of the legislation complained of. As above stated, moneys and credits of all kinds, including stocks and bonds, and certain tangible personal property were exempted by the law of 1911. We are only concerned with moneys and credits. The legislation must be tested by results. Compliance with the requirements of Section 5219 U. S. Statutes must be determined by the facts of the situation and not by a mere study of statutory phrasing. If this substituted system of taxation resulted in lightening the burden of taxation borne by national bank stock, then the state was justified in continuing to tax bank stock, state and national, as it had been theretofore taxed. The Wisconsin Tax Commission in its report for 1912, page 20, says:

"The net yield of the income tax is therefore considerably more than twice the amount of tax raised on the property which by virtue of the terms of the law is exempted."

In 1914 the Wisconsin Tax Commission in its report for that year, pages 91-92-94, made an exhaustive study of the effect of the income tax law, for the purpose of determining whether or not the substitute produced as much revenue as would have been produced under the discarded plan of assessing moneys and credits and other property exempted. The following excerpt from this study gives the conclusions of the Tax Commission:

"When the income tax was introduced there was exempted from taxation moneys and credits, stocks and bonds not otherwise specially provided for, personal ornaments and jewelry habitually worn, household furniture, machinery, implements and tools used on farm,

orchard and garden, and a watch carried by the owner, in addition the limitation on \$200 on musical instruments, and household furniture, the limitation of \$50 on tools and of \$50 on each watch carried by the owner, were removed. * * * Two questions arise. Was the exemption wise? Did the income tax fill the gap left by these exemptions? * * * The assessment of stocks, bonds, money and credits was particularly inequitable. A careful investigation of 473 estates some years ago showed taxable securities worth \$2,266,105 which were assessed at only \$74,995, or less than 3½% of their true value. The tangible personal property of these estates—household furniture, pianos, carriages and the like was inventoried at \$148,309 and assessed at \$80,390, or 54% of its true value. The securities, therefore, were worth fifteen times as much as the tangible personalty, but were actually assessed for a smaller amount.

“And the assessment of securities was unbelievably irregular. * * * (The Commission then took up an analysis of assessment of moneys and credits for 1910.) The year 1910 is taken merely because we have exact population statistics for that year. The figures in any other year would be practically the same. In Douglas County \$100 worth of moneys and credits were assessed—less than 1c per capita. In Iron, Vilas, Florence, Oneida, Sawyer and Taylor Counties no moneys and credits were assessed at all. In Kenosha County on the other hand the assessment amounted to \$71.68 per capita; side by side in the neighboring County of Walworth the assessment was only \$23.48, while in the adjoining County of Rock it sank to \$5.99; but jumped again to \$34.58 in the adjoining County of Green. In La Crosse County the assessment reached \$42.63 per head, while in no county bordering on La Crosse did it reach \$8.00 per head. In Outagamie County with the

prosperous City of Appleton the per capita assessment was \$1.15, whereas in the adjoining County of Winnebago it was \$15.26.

"Within any particular county the assessment of moneys and credits was just as irregular. Take Kenosha County, for example, where the assessment for this class of property was high in 1910. In Kenosha City the per capita average rose to \$105.95, while in Pleasant Prairie, town in the same county, it was only 6c per capita. But even in this county the large assessment is explained principally by the assessment of a few large estates in the probate court—the property largely of widows and orphans which because it was a matter of public record could not be concealed. * * The preceding facts make it reasonably clear that the personal property taxes in question were not worth keeping, whether a substitute could be secured or not. The income tax, however, more than filled the gap left by their abolition. Up to June 30, 1913, the cash collections under the income tax assessed in 1912 amounted to \$1,631,413.38. On the other hand, the careful estimates of what the personal property tax exempted would have yielded at the tax rates prevailing in 1912 were made and the amount so lost or relinquished was found to be \$703,589."

Therefore, we contend that the plan of taxation adopted in 1911 did actually result in lightening the burden of taxation borne by national banks. This being so we contend that there is no cause for complaint; that the spirit of Section 5219 U. S. Statutes was observed; that there was no unfriendly or hostile legislation enacted by the State of Wisconsin against the interests of stockholders of national banks.

The Wisconsin legislation complained of conforms to the declaration of this court with reference to 5219 U. S. Statutes, in *Davenport Bank vs. Davenport*, 123 U. S. 83, at page 85, which is as follows:

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks. Nor does the act of Congress require anything more than this; neither its language nor its purpose can be construed to go any farther. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress."

Under the Wisconsin laws all capital actually competing with national bank stock is assessed on identically the same basis, and all other moneyed capital was forced for the first time under this legislation to make a substantial contribution to the public revenues. A study of the growth and development of state and national banks in Wisconsin for the decade following the enactment of this legislation, 1911 to 1921, shows that this system of taxation did not handicap or retard these institutions.

The following figures taken from the annual report of the Commissioner of Banking for the years 1911 and 1921 show the growth of state and national banks in Wisconsin from Dec. 5, 1911, to Dec. 31, 1921 :

Dec. 5, 1911.

	State Banks (559)	National Banks (129)
Resources	186,003,596	186,653,594
Capital	16,591,650	17,155,000
Surplus	4,774,885	6,982,000

Dec. 31, 1921.

	State Banks (851)	National Banks (152)
Resources	472,909,215	329,014,000
Capital	34,410,100	24,285,000
Surplus	13,061,926	12,766,000

Comment on these figures is unnecessary.

Banking statistics also show that this system of taxation did not prevent national banks in Wisconsin from paying more than average dividends to their stockholders. The Comptroller of the Currency, in his report for 1911, shows that the ratio of dividends to capital in Wisconsin national banks for that year was 11.38, and that the ratio of dividends to capital and surplus was 6.63. His report for 1921 shows the corresponding ratios to be 11.60 and 7.83. This report, page 53-54, also shows:

	% Dividends to capital	% Dividends to capital and surplus
Wisconsin	11.60	7.83
Middle Western States...	11.80	7.30
New England	10.75	5.92
Eastern	14.44	6.73
Southern	11.77	7.15
Western	10.09	6.93
Pacific	11.18	7.36
U. S. (Entire)	12.42	6.88

While counsel for plaintiff in error loosely discuss competition with money invested in the shares of national banks in several places in their brief, they correctly describe the competition which congress had in mind when 5219, U. S. Statutes was enacted. On pp. 45-46 of their brief, with reference to this competition, they say:

“Section 5219 is to be read in the light of the purpose to protect these fiscal agencies of the national government against burdens which would ‘prevent the capital of individuals from freely seeking investment’ therein. or which ‘would diminish their value as an investment and drive capital so invested from this employment.’

Mercantile Bank vs. New York, 121 U. S. 138, 154, 155;

Amoskeag Savings Bank vs. Purdy, 231 U. S. 373, 390.

In other words, national banks are thus protected against competition for capital. In the last analysis, that is the whole purpose, since the ultimate result of competition is the discouragement of the organization or continued existence of national banks. It is undisputed that in this respect state and national banks in Wisconsin face competition for capital in the form of investments exceeding many times their combined capital (R. 48, 49). A man with \$10,000 to invest would have to face in a single year a tax of \$300 if he invested in stock of the plaintiff bank against a tax of \$17 or \$18 if he put the money out at interest with a purpose to keep it so employed. (R. 45, 46.)”

It must be conceded that the above statement indicates a rather deplorable state of affairs so far as investment of money in national bank stock is concerned. However, this argument made by counsel is completely refuted by the rec-

ord, in the case at bar. Under the statutes of Wisconsin national and state banks are authorized to pay the taxes on the shares of stock in such banks. 70.30 Wisconsin Statutes, 1921. Plaintiff bank paid the taxes levied by the state of Wisconsin against its shares of stock. (Findings; Transcript of Record 18-19). After the payment of all taxes, plaintiff bank paid 15% cash dividends on its capital stock in 1921 (Transcript of Record 34). Therefore, the return on \$10,000.00 invested in the shares of plaintiff bank yielded \$1,500.00 net in 1921 and the same amount of money invested in mortgages, according to testimony of plaintiff's president (R. 45), would yield from \$550.00 to \$600.00, and after payment of maximum income tax, the net return would be \$517.00 or \$564.00 respectively.

This conclusively shows that in 1921 the plan of taxation adopted in Wisconsin did not tend to prevent capital from seeking investment in the shares of national banks.

This is why the president of plaintiff bank did not know of any stockholder in the bank who would sell his stock for \$250 per share. (Transcript of Record 41).

In fairness, it must be conceded that plaintiff bank was making a good showing, but the figures above quoted indicate that on the average national banks were doing as well by their stockholders in the state of Wisconsin as these banks were doing by their stockholders in other parts of the country.

Therefore the adoption of the Income Tax Law and the concurrent exemption of money and credits by the state of Wisconsin, did not increase the burden of taxation borne by stock in national banks. This legislation was not hostile to these institutions. They accepted the benefits of this system of taxation for ten years and prospered under it. There is nothing in the record tending to show that this legislation hinders investment of capital in the shares of national banks. Therefore the decision of the supreme court of the state of Wisconsin in this case should be affirmed.

In conclusion we submit that the decision and judgment of the Wisconsin Supreme Court is correct in law and in fact and should be affirmed.

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“APPENDIX A”

(Loans on farm lands—Federal Reserve Act, Sec. 24 amended.) That section twenty-four be, and is hereby, amended to read as follows:

“SEC. 24. Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located, irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

“The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section.”

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No 186

FIRST NATIONAL BANK OF HARTFORD,
WISCONSIN,

Plaintiff in Error,

v.

CITY OF HARTFORD AND STATE OF WISCONSIN,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION OF DEFENDANTS IN ERROR FOR REHEARING

The city of Hartford, Wisconsin, and the state of Wisconsin, defendants in error, by J. C. Russell, city attorney of said city of Hartford, Edward J. Dempsey, Franklin E. Bump, assistant attorney general of the state of Wisconsin, and John W. Reynolds, attorney general of the state of Wisconsin, their counsel, respectfully petition the court for a rehearing of the above entitled cause, which was decided on March 21, 1927, on the following grounds:

That, as shown by the Congressional Record and as more particularly pointed out in the petition for a rehearing filed concurrently with this petition in behalf of the state of Minnesota in the case of *State of Minnesota, Petitioner, v. First National Bank of St. Paul*, No. 245, October Term, 1926 (which was argued with this cause and

also decided on March 21, 1927), Congress intended by the enactment of Revised Statutes sec. 5219, and the several amendments thereto, to confine the application of said section to the competitive moneyed capital of state and private banks only.

Without repeating the statement of grounds for rehearing, or the argument made in support thereof in the said petition for a rehearing in the Minnesota case, No. 245, we adopt and make the same a part of this petition by reference.

Respectfully submitted,

J. C. RUSSELL,
City Attorney, City of Hartford,

EDWARD J. DEMPSEY,

FRANKLIN E. BUMP,
*Assistant Attorney General
of State of Wisconsin,*

JOHN W. REYNOLDS,
*Attorney General
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Counsel for Defendants in Error.*

UNITED STATES OF AMERICA, }
STATE OF WISCONSIN, } ss.
COUNTY OF DANE }

J. C. RUSSELL, EDWARD J. DEMPSEY, FRANKLIN E. BUMP and JOHN W. REYNOLDS, counsel for the defendants in error in the above entitled cause, each for

himself does hereby certify that the above and foregoing petition for rehearing is presented in good faith, and not for delay.

Dated this 28th day of April, 1927.

J. C. RUSSELL,
City Attorney, City of Hartford,

EDWARD J. DEMPSEY,

FRANKLIN E. BUMP,
*Assistant Attorney General
of State of Wisconsin,*

JOHN W. REYNOLDS,
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